89-1332

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENE MCNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL., PETITIONERS

v.

HAITIAN REFUGEE CENTER, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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100 pp

QUESTION PRESENTED

The Immigration Reform and Control Act of 1986 provides that there shall be no judicial review of a determination "respecting an application" for Special Agricultural Worker (SAW) status except in the courts of appeals on review of a deportation order (8 U.S.C. 1160(e)). The question presented in this case is whether this provision precludes a federal district court from exercising general federal question jurisdiction over an action alleging a pattern or practice of procedural due process violations by the Immigration and Naturalization Service in its administration of the SAW program.

PARTIES TO THE PROCEEDING

Petitioners, defendants below,* are Gene McNary, Commissioner of Immigration and Naturalization; Richard Smith, Acting District Director, Immigration and Naturalization Service, District Office Number 6, Thomas Fisher, District Director, Immigration and Naturalization Service, District Office Number 26; Lewis DeAngelis, Director, Immigration and Naturalization Service Regional Processing Facility for the Southern Region; Immigration and Naturalization Service, Department of Justice; James A. Puleo, Acting Associate Commissioner for Examination, Immigration and Naturalization Service; Terrance M. O'Reilly, Assistant Commissioner for Legalization, Immigration and Naturalization Service; Dick Thornburgh, Attorney General of the United States; and the United States Department of Justice. The respondents, plaintiffs below, are Haitian Refugee Center, Inc., a not-for-profit corporation; Roman Catholic Diocese of Palm Beach; Marie Gizele Angrand; Germaine Cadet; Rosita Delva; Dieumercie Desir; Joseph Saintil Dieudonne; Gerard Henry; Marie France Jean-Philippe; Novamise Julien; Francklin Joseph; Sylvia Lindor; Recol Neus; Rose Pierrecina Lebon Pierre; Marie Philomene Servilien; Hector Trejo Tamayo; Juan Tamayo Vega; Marie Raquel Viera; and Jeanette Vixama.

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* The individual petitioners, who are parties in their official capacities, have been substituted for their predecessors in office, Alan C. Nelson, Perry Rivkind, Kenneth Pasquarell, William Chambers, Richard Norton, William Slattery, and Edwin Meese III, respectively. See Sup. Ct. R. 35.3.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of Gene McNary, Commissioner of Immigration and Naturalization, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 872 F.2d 1555. The opinion and order of the district court (App., *infra*, 18a-54a, 55a-57a) are reported at 694 F. Supp. 864.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1989. A petition for rehearing was denied on October 10, 1989. App., *infra*, 58a-59a. On December 28, 1989, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 17, 1990. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Immigration and Nationality Act, 8 U.S.C. 1105a, 1160, are set forth in an appendix (App., *infra*, 60a-63a).

STATEMENT

1. The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, "represent[ed] the most comprehensive immigration reform effort in the United States in 20 years." S. Rep. No. 132, 99th Cong., 1st Sess. 18 (1985); H.R. Rep. No. 682, 99th Cong., 2d Sess., Pt. 1, at 51-55 (1986) (describing history of legislation). As an integral part of that effort, Congress established two major legalization programs that permitted certain undocumented aliens in the United States to obtain lawful resident status. The first legalization program applied to aliens who had resided continuously and unlawfully in the United States since January 1, 1982. 8 U.S.C. 1255a. The second program applied to "Special Agricultural Workers" (SAW)—those aliens who had performed at least 90 days of qualifying agricultural work in the United States during the 12 months ending May 1, 1986. 8 U.S.C. 1160(a).

IRCA provided that applicants for SAW status had to submit their applications during an 18-month period beginning June 1, 1987. 8 U.S.C. 1160(a)(1)(A). If an applicant established both 90 days of qualifying agricultural work and his admissibility to the United States as an immigrant, the Attorney General was required to adjust the alien's status to that of temporary resident. 8 U.S.C. 1160(a)(1). In a second phase of the SAW program,

such aliens would become eligible for adjustment of status to that of aliens lawfully admitted for permanent residence. 8 U.S.C. 1160(a)(2).

Congress conferred authority for administering the legalization programs on the Attorney General, who in turn has delegated that authority to the Commissioner of Immigration and Naturalization. 8 U.S.C. 1160, 1255a; 8 C.F.R. 2.1. Under regulations of the Immigration and Naturalization Service (INS), SAW applications were initially processed by specially created legalization offices (LO). The LOs were required to interview each applicant personally, and in such interviews the applicant had to establish eligibility for SAW status. 8 C.F.R. 210.1(h), 210.2(c)(2)(iv) and (c)(4)(i). Thereafter, the applications were adjudicated by one of the four INS Regional Processing Facilities (RPF). 8 C.F.R. 210.1(p).[1] Whenever a SAW application was denied, INS regulations required that the alien be given written notice setting forth the reasons for the denial and the applicant's right to an administrative appeal. 8 C.F.R. 103.3(a)(2), 210.2(f).

IRCA expressly limits the scope of administrative and judicial review in the SAW program. Section 1160(e) of IRCA provides: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." 8 U.S.C. 1160(e)(1). The subsection then directs the Attorney General to establish an "appellate authority to provide for a single level of administrative appellate review," and provides that "[t]here

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[1] As amended, the regulations permitted INS district directors to approve SAW applications if an RPF had required a second interview and the alien established eligibility, or to deny SAW applications filed by applicants who were ineligible for approval. 8 C.F.R. 103.1(n)(2).

shall be judicial review of such a denial [of SAW status] only in the judicial review of an order of exclusion or deportation under section 1105a of this title." 8 U.S.C. 1160(e)(2)(A) and (e)(3)(A). The cited section, 8 U.S.C. 1105a, provides for the exclusive review of an order of deportation in the courts of appeals. See *Foti* v. *INS*, 375 U.S. 217 (1963); *INS* v. *Chadha*, 462 U.S. 919, 938 (1983). Judicial review of the denial of a SAW application is to be based solely on the record established before the administrative appeals authority. The findings of fact and determinations in that record are conclusive absent abuse of discretion or a demonstration that the findings are contrary to clear and convincing facts in the record as a whole. 8 U.S.C. 1160(e)(3)(B). Congress enacted virtually identical provisions for the general legalization program. 8 U.S.C. 1255a(f).

The legalization programs attracted "amnesty" applications on an unprecedented scale. According to information reported to Congress in May 1989, nearly 3.1 million applications were filed under the legalization programs. Of the 1,843,744 applications that had been adjudicated as of May 1989, 95.7% had been approved. In the general legalization program, the approval rate was 96.6%, while in SAW, the approval rate was 92.9%.[2] The INS anticipated that the overall approval rate for the SAW program would decline somewhat as it completed investigation of cases for fraud. *Immigration Reform and Control Act of 1986 Oversight: Hearings Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 400, 403 (1989) (statement of Alan C. Nelson, INS Commissioner).

[2] 1,768,089 applications were filed under the general legalization program, while 1,301,804 were filed under SAW.

2. Respondents are the Haitian Refugee Center (HRC); the Migration and Refugee Services of the Roman Catholic Diocese of Palm Beach, Florida (MRS); and 17 individual aliens whose SAW applications were denied. On June 13, 1988, respondents brought suit against petitioners in the United States District Court for the Southern District of Florida. Respondents alleged that the INS had adopted unlawful policies and practices in making SAW determinations, and that these policies and practices were resulting in erroneous denials of SAW applications.[3] Respondents claimed that these policies and practices violated IRCA and the Due Process Clause. On behalf of themselves and a class consisting of SAW applicants in the Eleventh Circuit who had been or would be denied SAW status because of the alleged unlawful practices, respondents sought declaratory, injunctive, and mandatory relief against the INS prohibiting those practices. App., *infra*, 2a, 19a-20a.

Following a hearing, the district court granted respondents' motion for class certification and for a preliminary injunction. App., *infra*, 55a-57a. Initially, the court held that it had subject matter juris-

[3] In particular, respondents alleged that the INS (1) had imposed an improper burden of proof on applicants by insisting upon corroborating evidence in addition to affidavits submitted by applicants to establish the requisite 90 days of agricultural employment; (2) had improperly denied "nonfrivolous" applications at the LO level, thereby depriving applicants of work authorization pending review of their applications; (3) had issued notices of denial that inadequately described the grounds for denial and provided inaccurate information regarding appeals; and (4) had conducted improper interviews by failing to provide interpreters for applicants, failing to disclose adverse evidence to applicants to permit rebuttal, and refusing to allow applicants to present witnesses in support of their claims. App., *infra*, 19a-20a.

diction over the action, notwithstanding IRCA's specific and limited provisions for judicial review. *Id.* at 36a-40a. The court reasoned that respondents' complaint fell under its general federal question jurisdiction because it did not challenge the INS's determination in any particular case. "[R]ather," the court explained, the complaint "attacks the manner in which the entire program is being implemented." App., *infra*, 38a, citing *Haitian Refugee Center (HRC)* v. *Smith*, 676 F.2d 1023 (5th Cir. 1982), and *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985).

The court also rejected petitioners' arguments that the organizational plaintiffs (HRC and MRS) lacked standing to pursue their claims against the operation of the SAW program. App., *infra*, 40a-44a. The court noted that HRC, whose main function is to provide legal representation to Haitian refugees, had alleged a direct injury to its ability to assist the Haitian refugee community, and an indirect injury to its membership. As to MRS, the court noted that it was a "qualified designated entity" under IRCA, authorized to assist in the preparation and submission of applications for SAW status.[4] MRS alleged that the INS's practices, by discouraging aliens from

[4] "Qualified designated entities" were created by IRCA in order to permit aliens to file legalization and SAW applications with nongovernmental intermediaries who would forward the applications to the Attorney General. 8 U.S.C. 1160(b)(1)(A), 1160(b)(2); 1255a(c)(1), 1255a(2). Congress provided for such entities in order to encourage undocumented aliens to apply for legalization without fear of exposure to the INS. H.R. Rep. No. 682, *supra*, Pt. 1, at 73. To that end, the files of such entities relating to an alien being assisted regarding a SAW application are confidential, and the INS lacks access to those files without the alien's consent. 8 U.S.C. 1160(b)(4).

applying for SAW status, had prevented it from performing its mission. *Id.* at 41a.

Turning to respondents' claim for preliminary relief, the court concluded that respondents were likely to prevail on the merits and had satisfied the other requisites for a preliminary injunction. The court therefore entered a detailed preliminary injunction ordering INS, *inter alia*, to vacate the denials issued to certain SAW applicants and remedy the violations that the court believed had affected the determinations in those cases. App., *infra*, 55a-57a.[5] Other paragraphs of the injunction ordered INS to take the following steps with regard to the processing of SAW applications (*id.* at 57a):

> (6) The Legalization Offices shall maintain competent translators, at a minimum, in Spanish and Haitian Creole, and translators in other languages shall be made available if necessary;
>
> (7) The INS shall afford the applicants the opportunity to present witnesses at the interview including but not limited to growers, farm labor contractors, co-workers, and any other individuals who may offer testimony in support of the applicant;
>
> (8) The interviewers shall be directed to particularize the evidence offered, testimony taken,

[5] The denials that the injunction ordered INS to reopen involved: defective notices of denial; applications denied on the basis of adverse evidence that INS had considered without the applicants' knowledge; and applications determined under an incorrect burden of proof. App., *infra*, 55a-56a. Petitioners did not challenge those paragraphs of the preliminary injunction on appeal (except to the extent that petitioners challenged the district court's jurisdiction). *Id.* at 2a-3a.

credibility determinations, and any other relevant information on the form I-696.[6]

3. Petitioners sought review of paragraphs (6), (7), and (8) of the preliminary injunction in the court of appeals, and challenged the district court's jurisdiction to entertain this action. The court granted a stay of those paragraphs pending appeal, but after briefing and argument, the court of appeals affirmed, holding that the district court had properly exercised jurisdiction over this case and had not abused its discretion in granting a preliminary injunction. App., *infra*, 1a-17a.

The court began by holding that 8 U.S.C. 1160(e) did not preclude the district court from exercising federal question jurisdiction. Stating that it "had previously considered and rejected this argument," the court explained that *HRC* v. *Smith*, *supra*, and *Jean* v. *Nelson*, *supra*, established the propriety of district court jurisdiction to review "allegations of systematic abuses by INS officials." App., *infra*, 9a-10a. Applying the principles announced in those cases, the court said (*id.* at 11a):

> In this action, appellees do not challenge the merits of any individual status determination; rather, like the plaintiffs in *Haitian Refugee Center* v. *Smith* and *Jean* v. *Nelson*, they contend that defendants' policies and practices in processing SAW applications deprive them of their statutory and constitutional rights.

[6] The court subsequently granted respondents' motion to compel the INS to produce in discovery up to 20,000 "legalization files" pertaining to the class members, notwithstanding the confidentiality provisions in IRCA protecting against disclosure of such files, see 8 U.S.C. 1160(b)(6). The government's petition for mandamus challenging that order was denied by the court of appeals. *In re Nelson*, 873 F.2d 1396 (11th Cir. 1989) (per curiam).

In addition, the court found inapplicable the exhaustion-of-remedies requirement of 8 U.S.C. 1105a. The court stated that the exhaustion requirement was not triggered because "the individual plaintiffs here do not seek substantive review of any individual ruling respecting their status," but only "challenge the adequacy of the procedures employed in the processing of their SAW application." App., *infra*, 12a. The court further refused to apply prudential exhaustion principles, because it concluded that even if the plaintiffs had pressed their claims through the administrative process, the chances that INS would revise its policies in response to the claims of a single applicant were "remote." *Id.* at 13a (citing *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976)). As to the organizational plaintiffs, the court held that exhaustion was "clearly" inapplicable because they "had no remedy to exhaust." App., *infra*, 11a.

The court also rejected petitioners' argument that the organizational plaintiffs lacked standing. The court believed that petitioners had challenged only the organizations' standing to raise the rights of third parties, but it dismissed that argument because the district court had found that the organizations had a cognizable injury in their own right. App., *infra*, 11a n.10.

Having disposed of the jurisdictional issues, the court of appeals held that the issuance of the preliminary injunction did not constitute an abuse of discretion. The court stated that the right of SAW applicants to apply for temporary residency, and to substantiate their claims to eligibility, must be accorded the protections of due process. Applying the three-factor test of *Mathews* v. *Eldridge*, *supra*, and *Landon* v. *Plasencia*, 459 U.S. 21 (1982), the court upheld the provisions of the injunction requiring INS to provide adequate translators at SAW inter-

views, to permit applicants to call witnesses at such interviews, and to particularize evidence offered, testimony taken, and evidentiary determinations on its forms for such interviews. App., *infra*, 13a-17a.

REASONS FOR GRANTING THE PETITION

This case presents a question of great importance in the governance of the legalization programs mandated by Congress in 1986. The court of appeals held that district courts have jurisdiction to entertain sweeping challenges to the policies and practices employed by INS in administering IRCA. That decision is contrary to the language and structure of IRCA's carefully crafted jurisdictional provisions. The court's decision permits circumvention of the sole avenue for judicial review under IRCA intended by Congress: a petition to a court of appeals for review of an order of deportation. By so holding, the court has sanctioned the improper intervention of federal district courts into the day-to-day business of administering the immigration laws. Moreover, the court of appeals' decision conflicts with the holding of the D.C. Circuit in *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d 1325, 1337 (1989), petition for cert. pending, No. 89-1018, which construed the virtually identical jurisdictional provisions applicable to the general legalization program.

The resolution of this conflict is of intense practical significance to INS. Numerous IRCA cases, based on the same jurisdictional theory as that accepted by the court below, have been filed in district courts around the country. These cases have caused substantial disruption to INS's processing of tens of thousands of legalization applications. Because the decision below undermines the scheme for judicial review embodied in IRCA and fundamentally alters the

balance of responsibilities between the INS and the courts, this Court's review is warranted.[7]

1. a. Congress carefully structured the SAW program to channel all judicial review of INS determinations to the courts of appeals in the review of a deportation order. The statute provides in all-encompassing terms: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." 8 U.S.C. 1160(e)(1). In the following paragraphs,

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[7] Although we do not agree with the court of appeals' analysis in affirming paragraphs (6), (7), and (8) of the preliminary injunction, we are not challenging that aspect of the judgment here. We have determined not to seek review of those holdings because the order at issue was only a preliminary injunction, and further proceedings were contemplated before the district court. Moreover, if our principal contention is accepted—that the district court lacks jurisdiction—further review of the details of the injunction is unnecessary. Nonetheless, we note that the court's affirmance of the injunction seriously misapplied the multifactor analysis set forth in *Mathews* v. *Eldridge*, *supra*, to govern procedural due process claims. In particular, the court gave no consideration to the government interest in retaining the current procedures, and it overrated the risk of error in the "generality of cases" (*Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 (1985)). See App., *infra*, 15a-16a. For example, Congress did not mandate the provision of government-paid interpreters at SAW interviews, apparently believing that the expense was unjustified in light of the size of the program, the probability that most applicants could obtain adequate translation assistance on their own, and the existence of bilingual INS employees. Such an assumption appears to be valid, as over 90% of the SAW applications thus far adjudicated nationwide have been approved. Moreover, the court of appeals failed to recognize the prospect that, because of INS's finite resources, the requirement of providing more "process" for some might force the agency to give less consideration to others. Compare *Mathews*, 424 U.S. at 348.

the subsection spells out precise procedures intended to provide the exclusive method of review. The subsection requires the establishment of "a single level of administrative appellate review," and unequivocally states that "[t]here shall be judicial review of such a denial [of a SAW application] only in the judicial review of an order of exclusion or deportation under section 1105a of this title." 8 U.S.C. 1160 (e)(2)(A) and (e)(3)(A). Section 1105a, in turn, requires that a deportation order be reviewed only in a court of appeals.[8] Congress could hardly have chosen clearer or more forceful language to express its intention to preclude *any* judicial review of a "determination respecting an application" for SAW status, other than in the court of appeals following the entry of a deportation order.

The present action raises claims that are squarely covered by IRCA's jurisdictional provisions, and thus cannot be brought in district court. The complaint alleged that the individual plaintiffs (and the class they sought to represent) were denied SAW status

[8] 8 U.S.C. 1105a was the product of a 1961 amendment to the Immigration and Nationality Act. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651. By making applicable the Hobbs Act, 28 U.S.C. 2341 *et seq.*, as the "sole and exclusive" provision for the review of "final orders of deportation," it confers exclusive jurisdiction on the courts of appeals. Congress's purpose in providing for review of "final orders of deportation" in the courts of appeals was "to expedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts." *Foti* v. *INS*, 375 U.S. at 226 (denial of suspension of deportation reviewable under Section 1105a); *Giova* v. *Rosenberg*, 379 U.S. 18 (1964) (per curiam) (denial of motion to reopen deportation proceedings reviewable under Section 1105a); cf. *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968) (district director's denial of a stay of deportation three months after entry of deportation order not reviewable under Section 1105a).

because of alleged unlawful procedures employed by INS in adjudicating their applications. For example, the plaintiffs alleged that INS imposed an improper burden of proof on SAW applicants; that INS denied SAW applicants the opportunity to present witnesses; that INS failed to furnish translators at government expense; and that INS provided defective notices of denial, hindering the ability of rejected SAW applicants to prosecute an administrative appeal. Complaint, paras. 64, 80-82, 86. Each of these claims directly attacks the process used by INS to make a determination respecting entitlement to SAW status. Hence, they could all have been raised before the INS's Administrative Appeals Unit, which provides administrative review of denials in the legalization programs. See 8 C.F.R. 103.3(a)(2), 210.2(f). The same claims could be raised in the court of appeals in the review of a deportation order. *INS* v. *Chadha*, 462 U.S. at 938 ("the term 'final orders' in [Section 1105a] 'includes all matters on which the validity of the final order is contingent'"). Consequently, respondents' claims are properly characterized as seeking review of a "determination respecting an application" for SAW status—precisely the type of claim that is governed by 8 U.S.C. 1160(e).[9]

[9] Other provisions of IRCA support that conclusion. The statute contemplates administrative review of objections to a denial of SAW status (8 U.S.C. 1160(e)(2)), and, by incorporating 8 U.S.C. 1105a, requires that such administrative remedies be exhausted. The holding below frustrates that objective, as plaintiffs may proceed to federal court without obtaining administrative review of their claims. App., *infra*, 26a. Permitting district court actions also breeds confusion about the appropriate record and standard of review. IRCA specifically designates the record for judicial review, and formulates a highly restrictive standard for reversal to be

Although respondents claimed to attack only a pattern or practice of conduct independent of particular cases, the relief that the complaint requested, and that the court granted, belies that claim. The complaint sought, in addition to prospective changes in INS procedures, an order requiring INS "to set aside all denials of SAW applications filed by Plaintiffs and members of the class they seek to represent who are subject to the practices, policies, and procedures addressed in this complaint," and "to reconsider all [such] SAW applications." Complaint, Prayer for Relief, paras. D(8)-D(9). Likewise, the district court ordered the INS to vacate some notices of denial, to reconsider other denials, and to afford still other applicants new opportunities to submit evidence. App., *infra*, 56a.

Such individualized relief makes manifest that the complaint's purpose was to achieve, on a mass scale, review and reversal of the INS's denials of SAW applications in particular cases. That reading of the complaint is no less accurate simply because respondents stopped short of asking that any applicant actually be granted SAW status by the court. The complaint simply combined many individual procedural claims, none of which was cognizable individually in district court, into one composite claim. But claims that are jurisdictionally barred individually cannot be salvaged simply by combining them into a class action. See *Snyder* v. *Harris*, 394 U.S. 332 (1969) (aggregation of claims not permitted for purposes of the jurisdictional-amount requirement in a class action founded on diversity jurisdiction).

In an analogous context, this Court has rejected arguments that individual plaintiffs can bypass re-

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applied by the courts of appeals. 8 U.S.C. 1160(e)(3)(B). The district court in this case ignored that standard in requiring the INS to reopen thousands of SAW applications.

strictions on judicial review by purporting to attack general policies rather than individual results. In *Heckler* v. *Ringer*, 466 U.S. 602 (1984), three plaintiffs had undergone a form of surgery and had unsuccessfully pursued a claim for reimbursement from the Secretary of Health and Human Services through some, but not all, layers of administrative review. A fourth plaintiff had not undergone the surgery at all, but claimed that the Secretary's refusal to allow payment for that type of surgery precluded him from obtaining it. All sued in district court to challenge the Secretary's reimbursement policy, although the applicable statute provided that judicial review was available only after the Secretary rendered a "final decision" on a particular claim.

Like the respondents here, the plaintiffs in *Ringer* contended that their suits were permissible because they challenged only the Secretary's " 'procedure' for reaching her decision," not the underlying decisions on their benefits claims. 466 U.S. at 614. This Court rejected the purported distinction. As to the three plaintiffs who were in the midst of the administrative process, the Court said that "it makes no sense to construe the claims * * * as anything more than, at bottom, a claim that they should be paid for their * * * surgery." *Ibid.* Explaining that the procedural challenges were "inextricably intertwined" with the underlying benefits claim, the Court concluded that "all aspects of respondents' claim for benefits should be channeled first into the administrative process which Congress has provided for the determination of claims for benefits." *Ibid.* The Court expressly rejected the view that "simply because a claim somehow can be construed as 'procedural,' it is cognizable

in federal district court by way of federal-question jurisdiction." *Ibid.*[10]

Just as the claimants in *Ringer* sought to evade the judicial review provisions of the Medicare Act by casting their challenge as a procedural one, respondents here sought to avoid the force of Section 1106(e) by contending that they were challenging only policies and practices of the INS, not any determinations respecting their applications for SAW status. That distinction is untenable. The procedures challenged by respondents are integral parts of INS's determinations of eligibility. The burden of proof, the ability to call witnesses, and the presence of translators all concern the process by which a particular claim is adjudicated, a process that takes on meaning only because of the outcome it produces. Such procedures can readily be challenged in an administrative appeal and, ultimately, in a court of appeals in the review of a deportation order; hence, review of those procedures in district court is precluded by IRCA. Because the courts of appeals have jurisdiction over such matters, this is not a case where district court jurisdiction is required in order to avoid construing IRCA to preclude all judicial review. Compare *Webster* v. *Doe*, 486 U.S. 592, 603

[10] The Court was equally emphatic in rejecting the arguments by the plaintiff who had never even submitted a claim for benefits, and who simply wanted to challenge the formal rule issued by the Secretary that would preclude reimbursement. 466 U.S. at 620-621. The Court explained: "Although it is true that Ringer is not seeking the immediate payment of benefits, he is clearly seeking to establish a right to future payments should he ultimately decide to proceed with * * * surgery." *Id.* at 621. The Court rejected such a preemptive attack on the Secretary's rule, because the alternative "would allow claimants substantially to undercut Congress' carefully crafted scheme for administering the Medicare Act." *Ibid.*

(1988); *Lindhahl* v. *OPM*, 470 U.S. 768, 778 (1985).[11]

The court also erred in upholding the district court's jurdisdiction over the claims of the organizational plaintiffs. MRS predicated its right to sue on its status as a "qualified designated entity," which the statute charged with assisting applicants. It claimed that the INS's conduct discouraged eligible applicants from filing applications and thereby prevented MRS from performing its mission under IRCA. HRC simply claimed injury to itself because of an impairment of its ability to assist its members and the diversion of its resources. Complaint, paras. 17-18; App., *infra*, 41a.[12] Organizations such as MRS

[11] For that reason, *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), is not relevant here. In that case, the Court held that notwithstanding provisions barring all judicial review of individual Medicare Part B *claims*, a district court challenge to *regulations* under Part B was permissible. The paramount consideration in that context was that absent such a challenge to the regulations, there would have been no judicial review of them at all. *Id.* at 670-676. Nor is this a case like *UAW* v. *Brock*, 477 U.S. 274 (1986), where the Court upheld the standing of a union (on behalf of its members) to challenge the Department of Labor's guidelines governing an unemployment benefits scheme. There, the applicable statute said that benefits determinations were to be made by a cooperating state agency and were reviewable only as provided under state law. The Court held that a district court challenge to the federal guidelines was permissible because the union did not seek benefits for any particular claimant. *Id.* at 284-285. *Brock* is distinguishable because the statute considered there was passed against a backdrop of prior Supreme Court decisions recognizing the availability of federal review under similar statutory schemes; moreover, the language restricting judicial review in the particular statute applied only to determinations by the state agency, not by the Department of Labor.

[12] HRC also claimed indirect injury because of adverse effects on its membership. Complaint, para. 17. Any such claim

and HRC, of course, cannot obtain review of the operation of the SAW program by raising claims in a petition for review of an order of deportation. But far from suggesting that such organizations are free to bring district court challenges to substantive or procedural aspects of the SAW program (unencumbered by the need to exhaust administrative remedies), the absence of a provision giving such parties judicial recourse suggests that Congress did not intend to authorize them to mount such challenges at all.

"[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 349 (1984). Although there is ordinarily a presumption favoring judicial review, it is overcome "whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Id.* at 351 (quoting *Data Processing Service* v. *Camp*, 397 U.S. 150, 157 (1970)). See also *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 399 (1987). In *Block*, this Court applied those principles in rejecting a claim that consumers could challenge administrative milk-handling orders free from the exhaustion requirements applicable to milk producers and handlers, the parties subject to those orders. The absence of any express provision for consumers to raise such challenges, the detailed scheme governing challenges by other parties, and the overlap of the consumers' interest with that of other parties supported the view that Congress had not intended to permit judicial

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of representative standing, however, depends on a showing that the members themselves could sue. *UAW* v. *Brock*, 477 U.S. at 282.

review at the instance of consumers. The same principles are applicable here.

Although Congress provided for "qualified designated entities" in order to encourage aliens to come forward and apply for legalization, it did not designate them as litigation agents for aliens. Far less did Congress identify any role under IRCA for a group, like HRC, that simply seeks to assist aliens. To allow either group to sue would vastly enlarge the range of possible lawsuits involving IRCA, while frustrating the contemplated layer of administrative review within the INS. For example, many of the procedural objections made in this case could be resolved administratively by appeals from individual applicants, without the need for judicial intervention. It would obviously undermine the statutory scheme to accord organizational plaintiffs such as MRS and HRC a right to immediate and unrestricted judicial review under the SAW program. IRCA was not designed for the benefit of those organizations, and it affords them no special protection. Moreover, their claims simply duplicate the claims of applicants. Under these circumstances, the court of appeals erred in allowing the organizational plaintiffs to sue.[13]

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[13] Contrary to the court of appeals' apparent view, the question is not simply whether HRC and MRS have constitutional standing under Article III. See App., *infra*, 11a n.10, citing *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982). *Havens Realty* merely found that an organization's impaired ability to counsel its members satisfied the Article III requirement of injury-in-fact. *Id.* at 378-379. IRCA, however, manifests a far more restrictive approach to judicial review than the constitutional minimum examined in *Havens Realty*. And, as "congressional preclusion of judicial review is in effect jurisdictional," *Block*, 467 U.S. at 353 n.4, the conclusion that Congress did not intend to authorize suit by the organizational plaintiffs means that the district court was without subject matter jurisdiction to hear their complaint.

b. The legislative history and background against which IRCA was enacted are fully consistent with the natural interpretation of Section 1160(e)'s language. The Senate precursors to IRCA would have gone farther than the statute later enacted by precluding all judicial review of decisions or determinations involving the legalization program.[14] The Senate Report on a 1985 bill, explaining the rationale underlying such a complete prohibition of judicial review, noted that since the legalization program was of a "magnitude * * * unique in history," it would require a "major managerial effort * * * to review the applications and assure that applicants qualified to be legalized will actually receive this benefit and that other applicants will not." S. Rep. No. 132, *supra*, at 48. Concerned about the incentives and opportunity of ineligible applicants to delay the disposition of their cases and derail the program, the Committee stated that the purpose of precluding all

[14] A Senate bill introduced in the 98th Congress expressly prohibited all judicial review. See S. 529, 98th Cong., 1st Sess., § 301(a) (1983) ("No decision or determination made by the Attorney General under this section may be reviewed by any court of the United States or of any State."); S. Rep. No. 62, 98th Cong., 1st Sess. 53 (1983). Senator Cranston supported an amendment much like the provision later enacted in IRCA. He described it as providing a "very limited form of judicial review that would not expand the burden of the courts." Rather, "[i]t would be available only when an improper denial of legalization is raised as a defense in a deportation proceeding." 129 Cong. Rec. 12,810-12,811 (1983) (remarks of Sen. Cranston). That amendment was rejected. *Id.* at 12,837. Although both the Senate and the House passed immigration reform bills in the 98th Congress, their conflicting provisions were not reconciled and no final bill was enacted. The Senate bill that passed in the 99th Congress also precluded judicial review, but the House version containing the present language prevailed in conference, see note 15, *infra*.

judicial review was "to insure reasonably prompt final determinations" so that dilatory tactics could not interfere with "the expeditious operation of the program for others." *Ibid.*[15]

Although the legislation ultimately enacted provided for limited judicial review, Congress did not intend to open the door to the kind of action brought here. As the House Committee Report explained, "[t]he bill provides for limited administrative and judicial review of denials of applications for legalization. * * * [T]he applicant can appeal a negative decision within the context of judicial review of a deportation order." The sectional analysis of the bill confirms that the provision governing review in the SAW program "[r]estricts judicial review to the context of review of an order of exclusion or deportation." H.R. Rep. No. 682, *supra*, Pt. 1, at 74, 99.

Given the size of the undertaking involved in the legalization programs, the restrictions on judicial review serve an important purpose. According to Congressional Budget Office estimates in 1985, as many as 5.6 million undocumented aliens lived in the United States, and as many as 565,000 would apply for legalization. S. Rep. No. 132, *supra*, at 64. The legalization program was described as "a 'one-time-only' program to address a problem resulting

[15] The bill in question, which would have established a general legalization program, provided for "no * * * judicial review (by class action or otherwise) of a decision or determination under this section." S. 1200, 99th Cong., 1st Sess., § 202(f) (1985). Although S. 1200 passed the Senate, the House version, H.R. 3810, 99th Cong., 2d Sess. (1986), which provided for limited judicial review, was accepted in conference. See H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 92, 95-96 (1986) (noting the selection of the House legalization provisions without explanation and without reference to judicial review provisions).

from the large-scale illegal immigration of the past." *Id.* at 16. In light of the obvious logistical and practical problems in implementing such a program, Congress had to balance fairness for individual applicants against the need for overall efficiency in implementing the program for the benefit of all applicants. There is no evidence that, in effecting a compromise allowing limited judicial review in the courts of appeals in the context of deportation proceedings, Congress envisioned that district courts would have the power (and obligation) to supervise the processing of thousands of legalization applications under the aegis of reviewing INS "policies and practices."

c. In rejecting petitioners' jurisdictional arguments, the court below never analyzed the language used by Congress in limiting judicial review. Instead, the court relied on two court of appeals precedents that purportedly created a "pattern and practice" exception to 8 U.S.C. 1105a. App., *infra*, 9a-11a, citing *HRC* v. *Smith*, *supra*, and *Jean* v. *Nelson*, *supra*. While we believe those cases were wrongly decided, they are in any event not controlling here, as neither case involved the distinctive statutory framework governing judicial review under IRCA.

In *HRC*, a class action was filed on behalf of over 4,000 Haitians who claimed that INS was improperly expediting their asylum claims in violation of their statutory and constitutional rights. INS contended that Section 1105a, which governs judicial review of all final orders of deportation and determinations incident thereto, precluded the assertion of the plaintiffs' claims in district court. 676 F.2d at 1032. Although finding INS's argument to have "surface appeal," the court rejected it, reasoning that an INS "pattern and practice" of violating the constitutional rights of aliens raised a "separate matter" from any individual case, and was "independently cognizable

in the district court under its federal question jurisdiction." *Id.* at 1033.

In *Jean* v. *Nelson*, the court of appeals relied on the same jurisdictional theory. There, a class of Haitian refugees who were in the midst of exclusion proceedings sued in district court claiming that they had been denied notice of their right to apply for asylum. Although Section 1105a permits aliens to challenge only final orders of exclusion after exhaustion of administrative remedies, the court concluded that those requirements were not applicable.[16] The court accepted the distinction drawn in *HRC* between "an individual challenge on a preliminary procedural matter," which was barred by Section 1105a, and "allegations of widespread abuses by immigration officials," which could be heard in district court under 28 U.S.C. 1331. 727 F.2d at 980 & n.32. In the latter case, the court said, because the legal issues affect "an entire class of aliens," the purposes of postponing judicial review until after the entry of individual final orders (the avoidance of delay and "procedural redundancy") would not be served. *Ibid.*

In our view, both *HRC* and *Jean* err in announcing that the district courts have power to adjudicate claims that Congress has said may be heard only in another forum or at another time. It is a fundamental principle of our judicial system that the jurisdiction of the lower federal courts is governed by statute. *Finley* v. *United States*, 109 S. Ct. 2003, 2006

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[16] The immigration laws distinguish between "excludable" aliens, who have not made an entry into the United States, and "deportable" aliens, who have entered although they may have done so unlawfully. See *Landon* v. *Plasencia*, 459 U.S. at 25-27. Different administrative proceedings are applicable to each category, *ibid.*, and an order of exclusion is reviewable exclusively in district court in a petition for habeas corpus. 8 U.S.C. 1105a(b).

(1989); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441 (1850). District courts cannot assume the power to hear cases simply because it may seem wise, efficient, or prudent to do so. While the court in *HRC* said that district courts may draw upon their "equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged," 676 F.2d at 1033, and *Jean* extended that principle to statutory claims, 727 F.2d at 980 n.32, this Court has only recently reaffirmed the longstanding principle that such equitable powers cannot override restrictions imposed by statute. *INS* v. *Pangilinan*, 486 U.S. 875, 883 (1988). *HRC* and *Jean* advance various policy reasons for short-circuiting the scheme for judicial review reflected in Section 1105a, but fail to reconcile their analysis with the language and meaning of the statute.[17]

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[17] When Congress has specified a particular review mechanism, courts are not free to fashion alternatives to the specified scheme. See *United States* v. *Fausto*, 484 U.S. 439 (1988); *Whitney Bank* v. *New Orleans Bank*, 379 U.S. 411, 419-422 (1965); *Yakus* v. *United States*, 321 U.S. 414 (1944). In particular, when Congress specifies that judicial review of agency action shall be had in the courts of appeals, district courts cannot assert jurisdiction to review the same actions. *FCC* v. *World Communications, Inc.*, 466 U.S. 463, 468 (1984) ("Litigants may not evade these provisions [requiring review of FCC orders in the court of appeals] by requesting the District Court to enjoin action that is the outcome of the agency's order."). See also *Public Utilities Comm'r* v. *Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985) (Kennedy, J.) ("where a statute commits review of final agency action to the court of appeals, any suit seeking relief that might affect the court's future jurisdiction is subject to its exclusive review"); *Telecommunications Research & Action Center* v. *FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) ("a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute").

But even accepting the *HRC-Jean* approach as to Section 1105a, there is still no warrant for extending that approach to IRCA. In IRCA, Congress employed language even broader than that in Section 1105a, expressly limiting review of all claims "respecting an application" under the SAW program to petitions for review of an order of deportation. This incorporates the judicial review apparatus applicable to deportation cases, but goes farther by adding an explicit prohibition on any other form of judicial review. Consequently, if there had been any doubt about the result under Section 1105a standing by itself, Congress removed it. The sole source of judicial power to review determinations respecting the denials of SAW applications is found in 8 U.S.C. 1160(e). If that section does not afford a basis for review—and it clearly does not authorize district court actions—a district court case must be dismissed for want of judicial power.[18]

2. The decision below conflicts with a decision of the United States Court of Appeals for the District of Columbia Circuit. In *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d 1325 (D.C. Cir. 1989), petition for cert. pending, No. 89-1018, the court of appeals, applying virtually identical jurisdictional provisions in IRCA, held that the district courts lack jurisdiction to hear challenges to INS rules governing eligibility for adjustment of status under the general legalization program.

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[18] That conclusion applies equally to the grant of general federal question jurisdiction under 28 U.S.C. 1331 and to the provision in the immigration laws giving jurisdiction to the district courts for "all causes, civil and criminal, arising under any of the provisions of this subchapter." 8 U.S.C. 1329. The grant of general jurisdiction under those provisions does not override the more specific limitations set forth in IRCA. Cf. *Whitney Bank* v. *New Orleans Bank*, *supra*.

In that case, as here, individuals and organizations that advise aliens challenged in district court certain INS policies regarding the administration of the legalization program under IRCA.[19] Under 8 U.S.C. 1255a(f), the judicial review "of a determination respecting an application for adjustment of status" in the legalization program may be had "only in the judicial review of an order of deportation under Section 1105a of this title." The plaintiffs argued that their challenge to a rule or policy was not controlled by that language. Rejecting that argument, the D.C. Circuit stated: "While some courts have found that allocation of jurisdiction appropriate under the judicial review provisions of [8 U.S.C. 1105a], apparently because they believed the only purpose of exclusive court of appeals jurisdiction was to prevent piecemeal litigation by aliens in the district courts that would delay deportation, we do not believe Congress intended that result under IRCA." 880 F.2d at 1331 (citation omitted).

The *Ayuda* court explained that a since a regulation governing eligibility will affect the outcome of many individual applications, "the regulation embodies determinations that will impact, and therefore

[19] The challenge in *Ayuda* arose from INS's interpretation of the eligibility requirements under the general legalization program. IRCA requires an alien to establish his continual unlawful residence in the United States since January 1, 1982. 8 U.S.C. 1255a(a)(2)(A). For nonimmigrant aliens (those who entered under a visa not entitling them to permanent residency, see 8 U.S.C. 1101(a)(15)), the alien must establish (unless his visa had expired through the passage of time) that he had violated the conditions for lawful status and that this was "known to the Government." 8 U.S.C. 1255a(a)(2)(B). The INS issued regulations that construed the term "Government" to mean the INS. 8 C.F.R. 245a.1(d). The plaintiffs contended that "Government" required a broader reading. *Ayuda*, 880 F.2d at 1327.

are 'respecting,' future applications." 880 F.2d at 331. Consequently, the plain language of Section 1255a(f)(1) (the counterpart to Section 1160(e) for the general legalization program) covers challenges to rules. Moreover, the court noted, permitting review of rules in district court would lead to a "rather peculiar" division of jurisdiction, because the courts of appeals would hear "only the application of the statute in presumably less important individual cases," while district courts would review "the much more important cases involving broad questions of statutory construction that would apply to a whole class of aliens." 880 F.2d at 1331-1332. Taking note of the precise and limited standard of review that Congress established in IRCA, the court added that it "seems inconceivable" that Congress would have closely cabined court of appeals review of INS regulations as applied to particular cases, but would have authorized full-scale APA challenges to such rules in district court. *Id.* at 1333. The court concluded that since an alien could later contest the validity of regulations in the fashion set forth in IRCA—in review of a deportation order—"it follows that the district court lacked jurisdiction to hear the same claim in a different forum." *Ibid.* The court also held that the organizational plaintiffs could not invoke the district court's jurisdiction, because to allow such actions would undermine IRCA's jurisdictional scheme. *Id.* at 1339-1340.[20]

[20] The court of appeals also relied on an alternative ground, namely, that the agency action under review was not ripe. 880 F.2d at 1341-1346. Chief Judge Wald dissented in *Ayuda*, *id.* at 1346-1367, believing that the district court had properly exercised jurisdiction, and that the INS's actions were ripe for review. The D.C. Circuit denied rehearing en banc, with Chief Judge Wald, and Judges Mikva, Edwards, and Ruth

The *Ayuda* decision dealt with the same jurisdictional language as that applicable to the SAW program. Compare 8 U.S.C. 1160(e) (SAW) with 8 U.S.C. 1255a(f) (general legalization program). Although *Ayuda* involved review of a regulation (as opposed to the challenge to "policies and practices" here), the same principles are controlling in both situations. In both cases, the core inquiry is whether Congress intended to permit district court review of challenges to general policies adopted by INS in administering the legalization programs. The *Ayuda* court's answer to that question is precisely contrary to that of the decision below.

3. The resolution of the jurisdictional issue is of practical significance to the INS. Apart from this case and *Ayuda*, nearly 30 other cases have been filed in district courts across the county to challenge INS rules and policies under the legalization programs. See, *e.g.*, *Doe* v. *Nelson*, 703 F. Supp. 713, 720-722 (N.D. Ill. 1988); *Zambrano* v. *Thornburgh*, No. S-88-455 EJG (E.D. Cal. Aug. 9, 1988), appeal pending, Nos. 88-15438, 88-15533 (9th Cir.); *Catholic Social Services* v. *Thornburgh*, No. S-86-1343-LKK (E.D. Cal. June 10, 1988), appeal pending, Nos. 88-15046, 88-15127, 88-15128 (9th Cir. argued Nov. 18, 1988); *LULAC* v. *INS*, No. 87-4757-WDK (C.D. Cal. 1988), appeal pending, No. 88-6447 (9th Cir.); *Immigrant Assistance Project* v. *INS*, 709 F. Supp. 998 (W.D. Wash. 1989), appeal pending, Nos. 89-35345, 89-35593 (9th Cir.). In many of these cases, the district court expressly found jurisdiction on the same theory espoused by the court below.

These cases have deeply intruded upon INS's functions under IRCA. Some courts (like the district

B. Ginsburg stating that they would have reheard the case en banc. Order, No. 88-5226 (Oct. 4, 1989).

court in *Ayuda*) have ordered detailed revision of the INS's rules; other courts, despite Congress's express provision for a one-year application window, have purported to extend the deadline for aliens to apply for legalization (*Catholic Social Services*, *supra*; *LULAC*, *supra*); still others (like the court below) have ordered the reopening of thousands of applications to correct purported procedural errors in their processing. INS has been compelled to defend itself in complex class actions around the country, often having to address the same legal issue in different cases pending simultaneously. Discovery and fact finding involving legalization issues have been particularly intrusive.[21] Moreover, the INS has been forced to respond to the plaintiffs' discovery requests for information deriving from legalization applications despite IRCA's strict confidentiality provisions. See 8 U.S.C. 1160(b)(6), 1255a(c)(5); note 6, *supra*. Above all, the district courts' micromanagement of the INS has distracted it from performing the task Congress entrusted to the Attorney General: administration of the legalization effort.

Although the legalization programs have largely concluded their first phase, we believe that the issues raised here warrant this Court's attention. Several large cases (including this one) are still pending, and tens of thousands of legalization applications may be affected by their outcome. In addition, the second phase of the legalization process (involving perma-

[21] For example, the district court in *Ayuda* appointed a Special Master to conduct a hearing designed to determine whether aliens had been deterred from applying for legalization because of INS's improper "known to the government" standard. Concerned by the potential burden of conducting such hearings, the government petitioned for mandamus, but the petition was denied. *In re Thornburgh*, 869 F.2d 1503 (D.C. Cir. 1989).

nent residency) is underway and may engender similar lawsuits. More fundamentally, provisions that define and limit opportunities for judicial review are a common feature of many statutory schemes. Clarifying the proper role of the courts in schemes like the present one thus has continuing significance, for "[w]hat is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Finley* v. *United States*, 109 S. Ct. at 2010. The litigation under IRCA has demonstrated that such clarity has not yet been achieved. Review of the decision below is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 88-5934

HAITIAN REFUGEE CENTER, INC., a not-for-profit corporation, ROMAN CATHOLIC DIOCESE OF PALM BEACH, MARIE GIZELE ANGRAND, GERMAINE CADET, ROSITA DELVA, DIEUMERCIE DESIR, JOSEPH SAINTIL DIEUDONNE, GERARD HENRY, MARIE FRANCE JEAN-PHILIPPE, NOVAMISE JULIEN, FRANCKLIN JOSEPH, SYLVIA LINDOR, PLAINTIFFS-APPELLEES

v.

ALAN C. NELSON, Commissioner of Immigration and Naturalization Service, PERRY RIVKIND, District Director, Immigration and Naturalization Service, District Office Number 6, KENNETH PASQUARELL, District Director, Immigration and Naturalization Service, District Office Number 26, WILLIAM CHAMBERS, Director, Immigration and Naturalization Service Regional Processing Facility for the Southern Region, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, RICHARD NORTON, Associate Commissioner of Examination, Immigration and Naturalization Service, DEFENDANTS-APPELLANTS

May 23, 1989

Appeal from the United States District Court
for the Southern District of Florida

Before RONEY, Chief Judge, VANCE, Circuit Judge, and KAUFMAN *, Senior District Judge.

VANCE, Circuit Judge:

This action was filed on June 13, 1988 on behalf of the Haitian Refugee Center, the Migration and Refugee Services of the Roman Catholic Diocese of Palm Beach, Florida, and seventeen applicants for temporary residence under the Special Agricultural Worker ("SAW") program provided for in section 210 of the Immigration and Nationality Act ("INA") (codified as amended by the Immigration Reform and Control Act of 1966 ("IRCA"), Pub.L. No. 99-603, 100 Stat. 3359, 3417 at 8 U.S.C. § 1160 (Supp. 1986)). Plaintiffs sought declaratory, mandatory and injunctive relief for themselves and a class of persons who have applied for or who will apply for temporary lawful residence status under the SAW program and who have been denied or who will be denied SAW status as a result of defendants' allegedly unlawful practices.[1]

Plaintiffs contend that a number of system-wide practices employed by INS officials in processing applications resulted in the improper denial of thousands of applications for SAW status. After an extensive hearing at which the parties presented testimony and offered evidence the district court certified the plaintiff class, ruled that it had jurisdiction and granted plaintiffs' motion for preliminary injunction. The court's order requires defendant to reopen cases in which: (1) the notices of denial were defective;

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* Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

[1] Appellants, who were defendants below, do not challenge the propriety of the class certification.

(2) the INS considered evidence adverse to the applicant without the applicant's knowledge; and (3) the application was adjudicated under an incorrect burden of proof. Appellants do not challenge these provisions of the district court's order. They take issue only with paragraphs (6) through (8) of the injunction, which provide:

> (6) The Legalization Offices shall maintain competent translators, at a minimum, in Spanish and Haitian Creole, and translators in other languages shall be made available if necessary;
>
> (7) The INS shall afford the applicants the opportunity to present witnesses at the interview including but not limited to growers, farm labor contractors, coworkers, and any other individual who may offer testimony in support of the applicant;
>
> (8) The interviewers shall be directed to particularize the evidence offered, testimony taken, credibility determinations, and any other relevant information on the form I-696.

Haitian Refugee Center, Inc. v. Nelson, 694 F.Supp. 864, 881 (S.D.Fla.1988). Appellants also contend that the district court lacked jurisdiction.

I. Statutory Background

The Special Agricultural Workers program was promulgated as part of the Immigration Reform and Control Act of 1986. The law establishes a seven-year program for the adjustment and admission of foreign agricultural workers to meet the special labor needs of American growers of perishable commodities. *See* H.R.Conf. Rep. No. 99-1000, 99th Cong., 2d Sess. 95, *reprinted in* 1986 U.S.Code Cong. & Admin.News

5649, 5840, 5850-51. The program directs the Attorney General to adjust the status of any qualifying alien admitted for temporary residence. To be eligible for the program, the alien must have applied for adjustment between June 1, 1987 and November 30, 1988 and establish that she is otherwise admissible to the United States as an immigrant. She is further required to demonstrate that she has resided in the United States and has performed seasonal agricultural services for at least ninety man-days during the twelve-month period ending on May 1, 1986. *See* 8 U.S.C. § 1160(a)(1). An alien who is granted temporary residence under the SAW program is ultimately eligible for admission as a permanent resident. Id. § 1160(a)(2).

The application process begins at the local Legalization Office ("LO") of the INS. The LO reviews each application for completeness and conducts an interview of the applicant. 8 C.F.R. § 210.2(c)(2)(iv). Based on the interview, the adjudicator may deny the application or make a recommendation that the application be approved or denied. Where a recommendation is made, the reasons for the recommendation are recorded on the "I-696" worksheet, which accompanies the application through the remainder of the process. The completed case file is then forwarded to one of four regional processing facilities ("RPF") for final review and decision. 53 Fed.Reg. 10065 (to be codified at 8 C.F.R. § 210.1(p)). A denial of the application by either the LO or the RPF may be appealed to the Administrative Appeals Unit. 8 C.F.R. § 103.3(a)(2)(iii).[2] The

[2] When the LO, the RPF or the AAU denies a SAW application the adjudicator must give the applicant written notice setting forth the reasons for denial. 8 C.F.R. § 103.3(a)(2).

Administrative Appeals Unit is the final level of administrative review, *id;* judicial review of an application for SAW status is available only in the context of review of an alien's exclusion or deportation order. 8 U.S.C. § 1160(e)(3).

At the LO, the interviewing officer must determine whether a completed application is "nonfrivolous." *Id.* § 1160(d)(2).[3] The regulations initially restricted denial at the LO level to cases where "the alien clearly fails to meet statutory requirements or the alien admits fraud or misrepresentation in the application process." 8 C.F.R. § 103.1(n)(2). On March 29, 1988 the regulations were amended to permit district directors at the LO level to deny all ineligible applications to ensure that provisional employment authorization is not issued inappropriately. *See* 53 Fed.Reg. 10062, 10064 (1988).

In the case of denial by the LO or the RPF the notice must inform the applicant of the availability of review and procedures for appeal. *Id.*

[3] The regulations provide that a

> complete application will be determined to be nonfrivolous at the time the applicant appears for an interview at the legalization or overseas processing office if it contains: (1) Evidence or information which shows on its face that the applicant is admissible to the United States or, if inadmissible, that the applicable grounds of excludability may be waived under the provisions of section 210(c)(2)(i) of the Act, and (2) evidence or information which shows on its face that the applicant performed at least 90 man-days of employment in seasonal agricultural services during the twelve-month period from May 1, 1985 through May 1, 1986, and (3) documentation which establishes a reasonable inference of the performance of the seasonal agricultural services claimed by the applicant.

8 C.F.R. § 210.1(j).

The SAW applicant must prove by a preponderance of the evidence that she worked the requisite ninety man-days [4] of seasonal agricultural services. She may meet this burden by "producing sufficient evidence to show the extent of that employment as a matter of just and reasonable inference." 8 U.S.C. § 1160(b)(3)(B)(iii). The burden then shifts to the Attorney General "to disprove the alien's evidence with a showing which negates the reasonableness of the inference to be drawn from the evidence." *Id.* To meet her burden of proof, the applicant must present evidence of eligibility independent of her own testimony. 8 C.F.R. § 210.3(b)(2). "Affidavits and personal testimony by an applicant which are not corroborated, in whole or in part, by other credible evidence (including testimony of persons other than the applicant) will not serve to meet an applicant's burden of proof." 8 C.F.R. § 210.3(b)(3). Where the applicant's employer or labor contractor has met its statutory obligation to maintain proper payroll records,[5] the applicant may meet her burden of proof through production of these records. 8 U.S.C. § 1160(b)(3)(B)(ii). The burden may also be met through the submission of affidavits "by agricultural producers, foremen, farm labor contractors, union officials, fellow employees, or other persons with specific knowledge of the applicant's employment." 8 C.F.R. § 210.3(c)(3). The affiant must furnish "a certified copy of corroborating evidence or state the affiant's willingness to personally verify the information provided." *Id.*

[4] The regulations provide that

> The term 'man-day' means the performance during any day of not less than one hour of qualifying agricultural employment for wages paid. If employment records relating to an alien applicant show only piece rate units completed, then any day in which piece rate work was performed shall be counted as a man-day. Work for more than one employer in a single day shall be counted as no more than one man-day for the purposes of this part.

8 C.F.R. § 210.1(i).

[5] As the district court noted, legislation such as the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872, requires employers and farm labor contractors to maintain payroll and employment records. Violations of these requirements, however, are common. *See Haitian Refugee Center, Inc. v. Nelson*, 694 F.Supp. at 869 n. 10.

II. Facts

The interview at the LO constitutes the only face to face encounter between the applicant and the INS allowing for the assessment of the applicant's credibility. The credibility of the applicant is particularly important where documentary evidence of the applicant's employment history is lacking. As the district court recognized, agricultural employers and labor contractors often fail to maintain accurate employment records. *See infra* n. 5. Workers are frequently paid in cash by labor contractors whose lists of employees are incomplete.[6]

Despite the importance of the interview, the INS does not record or prepare a transcript. In cases involving inadequate documentation of work history,

[6] As the district court noted, the fear of sanctions for noncompliance with federal laws underlies employers' and labor contractors' reluctance to keep accurate records. Labor contractors sometimes fear they will be subject to liability for violation of statutes designed to protect farm workers. In some instances, contractors and employers fear they will be liable for back social security and unemployment insurance taxes. *See id.* at 869-70.

the I-696 worksheet frequently includes the only factual findings on which the RPF bases its decision. These worksheets, however, often contain very little information about the interview. The worksheets of appellees Angrand and Dieudonne, for example, who were recommended for approval by the LO and were denied without explanation by the RPF, were completely blank.

The regulations contemplate the presentation of witnesses in support of an alien's application. "Affidavits and other personal testimony by an applicant which are not corroborated, in whole or in part, by other credible evidence (including testimony of persons other than the applicant) will not serve to meet an applicant's burden of proof." 8 C.F.R. § 210.3(b)(3). When affidavits of persons knowledgeable about the applicant's employment history are offered, *see* 8 C.F.R. § 210.3(c)(3), the regulations require the affiant to furnish "a certified copy of corroborating records *or* state [his] willingness to personally verify the information provided." *Id.* (emphasis added). The district court found that during the first months of the program, affidavits sufficed to corroborate the applicants' claims of employment. *Haitian Refugee Center, Inc. v. Nelson*, 694 F.Supp. at 871. Suspicion of widespread fraud in the application process, however, led to the LO's decision to deny many applications accompanied only by affidavits.[7] These develop-

[7] Prior to the application period, a form affidavit was developed for use by applicants to meet the burden of proof. The I-705 "Affidavit Confirming Seasonal Agricultural Employment of an Applicant for Temporary Residence Status Under Section 210 of the Immigration and Nationality Act" states that the affiant is "willing to personally confirm this information if requested' and is to be signed under penalty

ments enhanced the importance of live witnesses to the application process. Testimony at trial suggested that although the INS's general policy is to permit the testimony of witnesses, on some occasions applicants had been prevented from presenting witness [*sic*] in their behalf. There was also evidence that some LOs disallowed witness testimony as a rule.

Few applicants for SAW status speak English. An INS survey of applications received in the Miami district between August 1 and August 24, 1988 indicated that ninety percent of applicants spoke either Spanish or Haitian Creole. The INS does not provide interpreters at SAW interviews; some LOs, however, have bilingual employees who assist non-English speaking applicants. The INS does not investigate the qualifications of interpreters provided by the applicants. The record of the interview neither identifies the name of the interpreter nor indicates whether an interpreter was used.

III. Jurisdiction

Appellants challenge the district court's assertion of jurisdiction on the ground that under section 210 of the INA the courts of appeals have exclusive jurisdiction over "determination[s] respecting" a SAW application.[8] We have previously considered and rejected

of perjury. *See Haitian Refugee Center, Inc. v. Nelson*, 694 F.Supp. at 871; 52 Fed.Reg. 16195 (1987).

[8] Section 210(e)(1) provides that "[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." 8 U.S.C. § 1160(e)(1). Section 210(e)(3) states that "[t]here shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation" under section 106 of

this argument. In *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982), we concluded that because plaintiffs' complaint, which challenged the INS's accelerated procedures for processing asylum requests, addressed "matters alleged to be part of a pattern or practice by immigration officials to violate the constitutional rights of a class of aliens," plaintiffs' claims were "independently cognizable in the district court under its federal question jurisdiction." *Id.* at 1033. In *Jean v. Nelson*, 727 F.2d 957 (11th Cir.1984) (in banc), *aff'd*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985), we reaffirmed that section 106 of the INA (Codified at 8 U.S.C. § 1105a) does not deprive district courts of jurisdiction to review allegations of systematic abuses by INS officials. *Jean*, 727 F.2d at 980. We explained that to postpone "judicial resolution of a disputed issue that affects an entire class of aliens until an individual

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the INA. 8 U.S.C. § 1160(e)(3). Section 106(a) vests jurisdiction in the courts of appeals and provides that:

> The procedure prescribed by, and all the provisions of Chapter 158 of Title 28 [28 U.S.C. §§ 2341-2353], shall apply to, and shall be the *sole and exclusive* procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that—
>
> . . . .
>
> An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.

8 U.S.C. § 1105a(a), (c) (emphasis added).

petitioner has an opportunity to litigate it on habeas corpus would foster the very delay and procedural redundancy that Congress sought to eliminate in passing § 1105a." *Id.* In this action, appellees do not challenge the merits of any individual status determination; rather, like the plaintiffs in *Haitian Refugee Center v. Smith* and *Jean v. Nelson*, they contend that defendants' policies and practices in processing SAW applications deprive them of their statutory and constitutional rights.[9]

Appellants also contend that review of plaintiffs' claims was precluded by their failure to exhaust administrative remedies. This argument is clearly inapposite as applied to the organizational plaintiffs, who had no remedy to exhaust.[10] *See Ayuda, Inc. v.*

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[9] Federal courts also have jurisdiction to review allegations that agency officials have acted outside their statutory authority. *See Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329, 335, 53 S.Ct. 167, 170, 77 L.Ed. 341 (1932); *Jean v. Nelson*, 727 F.2d at 966, 967 n. 11. *See also Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985) (court of appeals has jurisdiction to review allegations that agency has abused its discretion by failing to comply with own regulations).

[10] Appellants also suggest that the organizational plaintiffs do not have standing "to assert the legal rights and interests of third parties." The district court's conclusion that HRC and MRS had standing, however, was not based on a theory of third-party standing. Instead, the court concluded that HRC and MRS had standing to challenge INS practices in their own right under the theory of *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982), which held that an organization which promotes racially integrated housing had sustained sufficient injury to establish standing to challenge the discriminatory practices of a real estate agency. *Id.* at 379, 102 S.Ct. at 1124. *See also Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-38

Meese, 687 F.Supp. 650, 660 (D.D.C.1988). As to the individual plaintiffs,[11] appellants argue that exhaustion is required by section 1105a(c), which provides that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right. . . ." 8 U.S.C. §1105a(c). We rejected this argument as well in *Haitian Refugee Center v. Smith*, which involved a constitutional challenge to procedures adopted by the INS for the processing of asylum claims. Like plaintiffs in that case, the individual plaintiffs here do not seek substantive review of any individual ruling respecting their status. Rather, they challenge the adequacy of the procedures employed in the processing of their SAW applications.[12] Accordingly, the exhaustion requirement imposed by section 1105a has no bearing on the district court's jurisdiction in this action.

Having concluded that the statutory exhaustion requirement is inapplicable, we now turn to the judicially-created exhaustion doctrine. We note at

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(D.C.Cir. 1986) (counseling organization alleging inhibitions of its daily operations had standing to challenge Health and Human Services secretary's implementation of the Age Discrimination Act).

[11] The members of the plaintiff class are at varying stages of the application process.

[12] Appellants' reliance on *Garcia-Mir v. Smith*, 766 F.2d 1478 (11th Cir. 1985), *cert. denied*, 475 U.S. 1022, 106 S.Ct. 1213, 89 L.Ed.2d 325 (1986), is misplaced. In that case, which also involved a class-wide challenge to INS procedures, we held that the statutory exhaustion requirement barred plaintiffs' additional claims for *substantive* review of their deportation and exclusion orders. In this case, no substantive relief is requested.

the outset that the application of the judicial exhaustion doctrine is subject to the discretion of the trial court. *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1556-57 (11th Cir.1985). The general rule is that a challenge to agency action in the courts must occur after available administrative remedies have been pursued. *Id.* at 1556. Exhaustion is not required, however, where the administrative remedy will not provide relief commensurate with the claim. *Id.* The nature of plaintiffs' constitutional challenge of INS procedures is such that relief at the administrative review level would have been unlikely. The chances are remote that the INS would have considered substantial revision of the procedures devised for the processing of SAW applications at the behest of a single alien mounting a constitutional attack in the context of administrative review of her application. *See Mathews v. Eldridge*, 424 U.S. 319, 330, 96 S.Ct. 893, 900, 47 L.Ed.2d 18 (1976); *Haitian Refugee Center v. Smith*, 676 F.2d at 1034. We therefore conclude that the exhaustion doctrine did not bar the district court's assertion of jurisdiction, and that the court acted well within its discretion in entertaining plaintiffs' claims for relief.

IV Preliminary Injunction

The grant or denial of a motion for preliminary injunction is a decision within the discretion of the trial court. *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir.1983). Appellate review of the district court's decision is very narrow. Accordingly, a district court's decision will be reversed only where there is a clear abuse of discretion. *Revette v. International Ass'n of Bridge, Structural and Ornamental Iron Workers*, 740 F.2d 892, 893 (11th Cir.1984).

That discretion is guided by four requirements for preliminary injunctive relief: (1) a substantial likelihood that the movants will ultimately prevail on the merits; (2) that they will suffer irreparable injury if the injunction is not issued; (3) that the threatened injury to the movants outweighs the potential harm to the opposing part; and (4) that the injunction, if issued, would not be adverse to the public interest. *United States v. Alabama*, 791 F.2d 1450, 1459 n. 10 (11th Cir.1986), *cert. denied*, 479 U.S. 1085, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987).

In enacting the Special Agricultural Worker program, Congress and the executive branch have granted aliens a constitutionally protected right to apply for temporary residency as well as a right to substantiate their claims for eligibility. *See, e.g., Haitian Refugee Center v. Smith*, 676 F.2d at 1038 (Congress intended through establishment of asylum procedure to grant aliens right to submit claims for asylum and opportunity to substantiate such claims). Congress may, through the enactment of legislation, create a substantive entitlement to a particular governmental benefit. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 262, 90 S.Ct. 1011, 1017, 25 L.Ed.2d 287 (1970) (federally created property interest exists in continued receipt of welfare benefits). Once Congress chooses to create such a system of entitlements and promulgates rules which restrict the discretion of administrative officers to grant benefits under the system, a property interest is created that is accorded procedural due process protection. *See Board of Regents v. Roth*, 408 U.S. 564, 576-577, 92 S.Ct. 2701, 2708-2709, 33 L.Ed.2d 548 (1972).

Having concluded that an entitlement interest exists in the right to apply for SAW status, it remains for us to determine what safeguards due process requires. In evaluating the constitutional sufficiency of the procedures provided, we must consider (1) the interest at stake for the individual, (2) the risk of an erroneous deprivation of the interest through the procedures used and the probable value of additional procedural safeguards, and (3) the government's interest in avoiding the potential burdens that the additional or substitute procedures would entail. *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903; *see also Landon v. Plasencia*, 459 U.S. 21, 34, 103 S.Ct. 321, 330, 74 L.Ed.2d 21 (1982) (*Mathews* test appropriate for evaluation of procedures in immigration context).

Plaintiffs' interest in establishing their entitlement to adjustment under the SAW program is plain. Evidence as to the second *Mathews* factor is equally persuasive. Without an adequate interpreter at the interview, the risk of an erroneous recommendation is unacceptably high. The ability of the adjudicator at the interview to make a reasonable assessment of the applicant's credibility is obviously hampered by his inability to understand the applicant's statements. Furthermore, the preclusion of witness testimony clearly increases the risk of erroneous determinations in light of the practice of cursorily denying applications accompanied only by affidavits, especially in cases involving inadequate documentation of employment history.

Paragraphs (6)[13] and (7) of the district court's order require no more than is required by IRCA, its

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[13] Paragraph (6) requires LOs to "maintain competent translators, at a minimum, in Spanish and Haitian Creole, and translators in other languages . . . if necessary." This provision is properly tailored to meet the requirements of due

accompanying regulations and INS procedures. Appellants concede that the SAW program requires that an interpreter be used in every case where the applicant does not understand the adjudicator. The INS Examinations Handbook directs the examining officer to "make certain whether the services of an interpreter are required" if the person being questioned does not speak English. The regulations clearly allow the presentation of witness testimony, *see* 8 C.F.R. § 210.3(b)(3), (c). Appellants acknowledge that the general rule is that SAW applicants may bring witnesses to testify on their behalf. Because appellants' procedures already contemplate what these provisions of the injunction require, it is unnecessary for us to consider the third *Mathews* factor.

Paragraph (8) of the injunction directs LO interviewers to "particularize the evidence offered, testimony taken, credibility determinations and any of the relevant information on the form I-696." Appellants argue that this requirement constitutes an additional procedure which would entail significant administrative and financial burdens. Without any record of what transpired at the interview, however, the review provided for in IRCA is meaningless. "Meaningful review requires that the reviewing court should *review*." *Kent v. United States*, 383 U.S. 541, 561, 86 S.Ct. 1045, 1057, 16 L.Ed.2d 84 (1966) (emphasis added). Due process thus requires that the interviewer set forth the factual basis for his recommendation with sufficient specificity to permit the RPF (and eventually the Administrative Appeals

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process. "If necessary," however, does not mean that interpreters in other languages shall automatically be required, absent court order, in the case of an non-English speaking applicant who speaks neither Spanish nor Haitian Creole.

Unit and court of appeals) to make a decision regarding the recommendation. *See, e.g., Jang Man Cho v. Immigration & Naturalization Service*, 669 F.2d 936, 940 n. 6 (4th Cir.1982) (reasons for finding witness unbelievable should be fully stated as a prerequisite for appellate review).

For the reasons set forth above, we conclude that the district court did not abuse its discretion in granting plaintiffs' motion for preliminary injunction. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-1066-Civ-ATKINS

HAITIAN REFUGEE CENTER, INC., a not-for-profit corporation; ROMAN CATHOLIC DIOCESE OF PALM BEACH; MARIE GIZELE ANGRAND; GERMAINE CADET; ROSITA DELVA; DIEUMERCIE DESIR; JOSEPH SAINTIL DIEUDONNE; GERALD HENRY; MARIE FRANCE JEAN-PHILIPPE; NOVAMISE JULIEN; FRANCKLIN JOSEPH; SYLVIA LINDOR; RECOL NEUS; ROSE PIERRECINA LEBON PIERRE; MARIE PHILOMENE SERVILIEN; HECTOR TREJO TAMAYO; JUAN TAMAYO VEGA; MARIE RAQUEL VIERA; and JEANETTE VIXAMA, PLAINTIFFS

vs.

ALAN C. NELSON, Commissioner of Immigration and Naturalization Service; PERRY RIVKIND, District Director, Immigration and Naturalization Service, District Office Number 6; KENNETH PASQUARELL, District Director, Immigration and Naturalization Service, District Office Number 26; WILLIAM CHAMBERS, Director, Immigration and Naturalization Service Regional Processing Facility for the Southern Region; IMMIGRATION AND NATURALIZATION SERVICE, Department of Justice; RICHARD NORTON, Associate Commissioner for Examination, Immigration and Naturalization Service; WILLIAM SLATTERY, Assistant Commissioner for Legalization, Immigration and Naturalization Service; EDWIN MEESE, III, Attorney General of the United States; and UNITED STATES DEPARTMENT OF JUSTICE, DEFENDANTS

[Filed Aug. 22, 1988]

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION AND CERTIFYING THE CLASS

THIS CAUSE is before the court on the plaintiffs' motion for a preliminary injunction. After an extensive hearing at which the parties offered evidence and presented witnesses and after exhaustive briefing, the court concludes that it is vested with jurisdiction to consider this matter and renders this Memorandum Decision in accordance with Fed. R. Civ. P. 52(a). It is further

ORDERED AND ADJUDGED that the plaintiffs' motion is *GRANTED.*

This action was initiated on behalf of the Haitian Refugee Center ("HRC"), the Migration and Refugee Services of the Diocese of Palm Beach ("MRS"), and 17 individual applicants for temporary residence under the Special Agricultural Workers ("SAW") provisions found at section 210 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1160, as amended by the Immigration Reform Control Act ("IRCA"), Pub. L. 99-603, 100 Stat. 3417.[1] The plaintiffs seek declaratory, mandatory, and injunctive relief for themselves and a class of persons who have applied or will apply for SAW status and who have been or will be denied such status because of the defendants' alleged unlawful practices and policies. The plaintiffs contend that the defendant Immigra-

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[1] IRCA created section 210 of the Immigration and Nationality Act, 8 U.S.C. § 1160.

tion and Naturalization Service ("INS") officials have (1) imposed an unlawful burden of proof by requiring applicants to produce corroborating evidence in addition to affidavits to prove the performance of the requisite ninety man-days of agricultural labor, (2) denied the individual plaintiffs' alleged "non-frivolous" applications prior to March 29, 1988, and thus denied work authorization pending final adjudication of the claims contrary to the statute and regulations, (3) issued I-292 notices of denial which failed to state the specific reasons for denial and provided incorrect information for purposes of appeal, and (4) imposed an interview procedure which violates the applicants' Fifth Amendment right to due process by failing to provide interpreters, failing to allow the applicants to rebut adverse evidence, and refusing to allow the applicants to present witnesses on their own behalf.

The plaintiffs seek a preliminary injunction: (1) enjoining the defendants from applying an improper burden of proof to SAW applications; (2) enjoining defendants from utilizing an interview process that is procedurally deficient by failing to allow applicants to clarify information, failing to apprise applicants of adverse evidence with an opportunity to rebut, failing to provide an opportunity to present live witnesses, failing to provide competent interpreters, and failing to make a verbatim transcript; (3) requiring the defendants to readjudicate all SAW applications filed by the plaintiffs using the proper burden of proof; (4) requiring the defendants to readjudicate all SAW applications filed by the plaintiffs and members of the class they seek to represent which were denied at the Legalization Offices prior to March 29, 1988, for lack of work records, precise documentation, or for suspected fraud; (5) requiring the defendants to grant work authorization and stays of deportation to all the plaintiffs and members of the class they seek to represent whose applications were denied at Legalization Offices prior to March 29, 1988, for lack of work records, precise proof of employment, or suspected fraud; and (6) requiring defendants to renotify and provide specific reasons for denial to those applicants who received denials on form I-292.

BACKGROUND

The Special Agricultural Workers Program ("SAW") was created by and as part of the Immigration Reform and Control Act of 1986 ("IRCA") and was intended to extend lawful immigrant status to qualifying aliens. The program mandates that the Attorney General adjust the status of any alien to that of an alien admitted for temporary residence if that alien applies for a change in status between June 1, 1987, and November 30, 1988, and is able to establish that s/he has resided in the United States and performed seasonal agricultural services for at least ninety man-days during the twelve month period ending on May 1, 1986. *See* 8 U.S.C. §§ 1160(a)(1)(A) and (B). The applicant must also establish that s/he is admissible to the United States as an immigrant. 8 U.S.C. § 1160(a)(1)(C). An alien who is granted temporary residency under this program will eventually be admitted as a permanent resident. 8 U.S.C. § 1160(a)(2).

The application process begins at one of five Legalization Offices ("LO") located in the state of Florida where the application is reviewed and the

applicant interviewed.[2] The interviewing officer either denies the application, recommends that it be denied, or recommends that it be granted. Those applications not denied outright at the LO are forwarded to one of four Regional Processing Facilities ("RPF") for adjudication. A denial that issues either from an LO or from the RPF may be appealed to the Legalization Appeals Unit ("LAU"), the final administrative decision in a SAW applicant's case.[3]

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[2] Regulations to implement the SAW provisions were first promulgated on May 1, 1987. 52 Fed. Reg. 16190 *et seq.* and 16195 *et seq.* (May 1, 1987), codified at 8 C.F.R. Parts 103 and 210 (1987). In relevant part, the regulations provide that the application for SAW status must be filed on Form I-700 together with the necessary fee, report of medical examination, evidence of identity, and fingerprint chart. "Each applicant shall be interviewed by an immigration officer" at the appropriate INS Legalization Office, except that the interview may be waived when it is impractical because of the health of the applicant. 8 C.F.R. § 210.2(c) (2) (iv).

[3] Whenever a SAW application is denied by the LO or by the RPF, the applicant must be given written notice setting forth the specific reasons for the denial on Form I-692. 8 C.F.R. § 103.3(a) (2). The form must contain advice that the applicant may appeal the decision and that such appeal must be taken on Form I-694 within 30 days of service of the denial notification. *Id.* The appeal with the required fee must be filed with the RPF for consideration by the Associate Commissioner for Examinations (Administrative Appeals Unit ("AAU")). *Id.*; 8 C.F.R. § 210.2(f). If the AAU dismisses the appeal, no further administrative appeal is available nor may the application be filed or reopened before an immigration judge or Board of Immigration Appeals during exclusion or deportation proceedings. 8 U.S.C. § 1160(e) (2); 8 C.F.R. § 103.3(a) (2). The Act does provide, however, for judicial review of an administrative denial of a legalization application by the AAU, but only in the judicial review of an order of exclusion or deportation. 8 U.S.C. § 1160(e) (3).

LOs are "local offices of the Immigration and Naturalization Service which accept and process applications for legalization or special agricultural worker status", under the authority of the district directors in whose districts such offices are located." 8 C.F.R. § 210.1(h). At this stage, the interviewing officer determines whether a completed application filed for processing is "non-frivolous."[4] Under subsection (d) of section 210 of the Act, applicants who file a "non-frivolous" case of eligibility for SAW status under subsection (a) shall not be deported or excluded and shall be granted authorization to engage in employment pending final determination of his or her ap-

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[4] *See* H.R. CONF. REP. No. 99-1000, 99th Cong., 2d Sess. 85, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5840, 5852.

> The Conferees intend that the Immigration and Naturalization Service allow aliens to make a declaration, under penalty of perjury and under such terms and conditions that the Attorney General may by regulation provide, (i) attesting that they have in fact worked the requisite number of man-days required; (ii) identifying the type or nature of documentation they intend to adduce to make the necessary showing, (although this last shall not limit their rights to produce other evidence at a later date), (iii) acknowledging that false statements concerning their eligibility constitute a violation of Title 18 U.S.C., and may make them ineligible for this program and, further, subject to deportation or exclusion, and (iv) identifying their current or immediate past employer(s). *The Conferees intend that INS not go beyond these criteria in seeking to determine whether an alien has made a non-frivolous case for eligibility. To do otherwise may undermine the purposes of this section, viz., to encourage undocumented workers to come forward and seek to obtain legal status.*
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> Id. (emphasis added).

plication.[5] Only an LO is authorized to issue work authorization to an applicant who files a "non-frivolous" claim. 8 C.F.R. § 210.4(b).

The regulations initially provided that the district director could only deny, through the LOs, those applications found to be frivolous—those that clearly failed to meet the statutory requirements—or those applications in which the applicant admitted fraud or misrepresentation in its preparation. 8 C.F.R. § 103.1(n)(2). District directors may now deny all ineligible applications at the LO level, 53 Fed. Reg. 10062, 10064 (March 29, 1988), but the regulations contemplate that only those applicants filing frivolous or fraudulent claims be denied a stay of deportation or exclusion and work authorization. 8 U.S.C. § 1160 (d)(2) and (3)(B).

The applicant has the initial burden of proving by "a preponderance of the evidence" that s/he worked the requisite ninety man-days of seasonal agricultural services and may meet this burden by producing "sufficient evidence to show the extent of that employment as a matter of *just and reasonable inference.*" 8 U.S.C. § 1160(b)(3)(B)(i) (emphasis added). Having done so, "the burden then shifts to the Attorney General to disprove the alien's evidence with a showing which negates the reasonableness of the inference to be drawn from the evidence." 8 U.S.C. § 1160(b)(3)(B)(iii).

[5] 8 U.S.C. § 1160(d)(2). The standard for defining "non-frivolous" was endorsed by Congress through an amendment to section 210(d) of the Act, 8 U.S.C. § 1160(d) on December 22, 1987. Pub. L. 100-202, 101 Stat. 1329-18 (Dec. 22, 1987). The new 8 U.S.C. § 1160(d)(3)(B) provides that "[d]uring the application period as defined in section 1160(a)(B)(1)(B) of this title any alient [sic] who has filed an application for adjustment of status within the United States as provided in section 1160(b)(1)(A) of this title pursuant to the provision of 8 C.F.R. section 210.1(j) is subject to paragraph (2) of this subsection."

The regulations provide that "[t]he sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility," and, to meet the burden of proof, an applicant must provide evidence of eligibility "apart from his or her own testimony." 8 C.F.R. § 210.3(b)(2). "Affidavits and other personal testimony by an applicant which are not corroborated, in whole or in part, by other credible evidence (including testimony of persons other than the applicant) will not serve to meet the applicant's burden of proof." 8 C.F.R. § 210.3(b)(3)).[6] If an employer or labor contractor has kept proper and adequate records, an applicant may meet the burden of proof by timely production of those records under regulations to be promulgated by the Attorney General. 8 U.S.C. § 1160(b)(3)(B)(ii): *but see* n.10 *infra*. An alien may also meet the burden of proof by producing affidavits of agricultural producers, farm labor contractors, union officials, fellow employees, or other persons who have knowledge of the applicant's employment. 8 C.F.R. § 210.3(c)(3). The affiant must provide "a certified copy of corroborating records *or* state [his] willingness to personally verify the information provided." *Id.* (emphasis added).

[6] The INS considers that an affidavit by the applicant is no different than his testimony and a recent amendment to the regulation omits an earlier reference to the applicant's affidavit to avoid confusion. 53 Fed. Reg. 10063 (March 29, 1988).

FACTS

The individual plaintiffs are applicants who have been denied SAW status. The plaintiffs Jean-Phillipe, Vixama, Delva, and Henry were denied at the LO; the plaintiffs Angrand,[7] Lindor, Neus, Joseph, Tamayo, Vega, and Viera were denied by the RPF. Julien and Servilien were denied by the RPF and their denials affirmed on appeal by the LAU.[8]

The plaintiff HRC is a non-profit membership corporation organized under the laws of the state of Florida with its principal place of business in Miami. Its membership consists of Haitian refugees and its main function is to provide its membership with legal representation.

The Roman Catholic Diocese of Palm Beach through its component the plaintiff MRS is an affiliate of the

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[7] Plaintiffs Angrand and Dieudonne were both recommended for approval by the examiner who interviewed the applicant. Both cases were denied directly by William Chambers, director of the Texas RPF. There is no indication in these files that the INS had any reason to doubt the credibility of the affiant or that any material inconsistencies were found between the information provided in the application and in the interview. Gesner Desmornes, the farm labor contractor for whom both Plaintiffs Angrand and Dieudonne worked, testified as to his lack of payroll records and the fact that INS never contacted him to verify Plaintiffs' employment. Mr. Desmornes is not on the list of "suspect contractors" which Defendants used to identify questionable affidavits.

[8] In fact, Plaintiff Julien responded to the RPF's decision that she was ineligible, because she has failed to submit additional corroborating evidence of her claim other than affidavits from her crew leader, by submitting additional evidence, including affidavits from the owner of the farm where she worked, her crew leader and a co-worker. She was denied by the LAU because she had not submitted payroll records.

United States Catholic Conference. MRS has been designated by the INS as a Qualified Designated Entity ("QDE") under section 245A(C)(2) of the IRCA, 8 U.S.C. § 1255A(c)(2) for the purpose of receiving the applications of farmworkers seeking SAW status. MRS serves the Diocese of Palm Beach including the geographical areas of Palm Beach, Martin, St. Lucie, Indian River, and Okeechobee Counties. The Diocesan program provides counseling to SAW applicants and receives applications for refugee status.

As of July 6, 1988, the INS District LOs servicing the state of Florida had received 77,861 SAW applications; 73,246 of those applicants had received interviews as of that date. Of those interviewed, 54,536 were recommended for approval and 14,524 for denial by the LO. The remaining 4,086 were denied at the LO.[9]

Of the 77,609 applicants as of July 1, 1988, 30,425 are Haitians who speak Creole. Although most SAW applicants do not speak English, the INS does not provide interpreters at SAW interviews. Non-English speaking applicants are expected to provide their own interpreters; the INS does not investigate the proficiency of any interpreter beyond asking if they understand English and the language which they intend to interpet. The record of the interview does not identify the interpreter, his or her qualifications, or in fact whether an interpreter was used. The

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[9] Mr. William Chambers director of the RPF in Texas which adjudicates applications filed in the state of Florida testified that the denial rate in SAW cases is approximately 29%. The denial rate for applications filed for legalization under section 245A of IRCA is less than 5%.

Okeechobee LO has never had a Creole speaking employee.

The interview is an extremely important step in the application process. It is the only face to face encounter between the applicant and the INS allowing the INS to assess the applicant'z credibility. Yet, the INS does not record or prepare a transcript of the interview. Any inconsistencies between the applicant's documents and information elicited by the interviewer are to be noted on the worksheet, Form I-696, however, the plaintiffs' worksheets contain very little information pertaining to the interview or credibility determinations.

An applicant may only inspect this worksheet through a request pursuant to the Freedom of Information Act.

Applicants whose applications are determined to be non-frivolous but are recomended for denial at the LO level are usually not made aware of the recommendation or its basis.

Farm labor contractors and other agricultural employers often do not maintain accurate employment records. This makes it difficult and, in many cases, impossible for a farm worker to produce formal documentation.[10] Farm workers are likely to be paid in

[10] Laws such as the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1801 *et seq.* and its predecessor, the Farm Labor Contractor Registration Act, 7 U.S.C. § 2041 *et seq.* require farm labor contractors and other agricultural employers to maintain proper payroll records and provide pay receipts. Numerous cases brought either in this state or against Florida-based farm labor contractors demonstrate that violations of these recordkeeping provisions remain widespread, if not pervasive. *See, e.g., Washington v. Miller,* 721 F.2d 797 (11th Cir. 1983); *Rivera v. Adams Packing Ass'n, Inc.,* 707 F.2d 1278 (11th Cir. 1983); *Lucien*

cash by farm labor contractors whose lists of workers are often incomplete.[11] Testimony suggested that in cases where records were kept, employers are frequently reluctant to produce them for fear of incriminating themselves for violations of federal law and subjecting themselves to civil penalties.

Bertrand, et al. v. Jimmie Lee Jorden, 672 F. Supp. 1417 (M.D. Fla. 1987); *Bohan v. Hudson,* 28 Wage & Hour Cas. 357 (BNA) (E.D.N.C. 1987); *Haywood v. Barnes,* 109 F.R.D. 58 (E.D.N.C. 1986); *Davis v. Williams,* 622 F. Supp. 386 (W.D.N.Y. 1985); *Donovan v. Anderson,* 24 Wage & Hour Cas. 1468 (BNA) (D.S.C. 1981).

[11] Many times payroll records maintained by farm labor contractors do not list all of the individuals who worked for that employer; often, farm labor contractors and agricultural employers whose records are deficient are reluctant to make those records available to their employees or former employees because they fear they will be subject to civil penalties for violations of federal laws enacted for the protection of the farmworkers and for back social security and unemployment insurance taxes. A most common situation is when a husband and wife or, in some cases, an entire family, work together under a single name. Often, where workers are being paid on a piece-rate basis, several workers may work together filling a bucket or a bin (as in the case of citrus) for which they receive a ticket. The work may be recorded only under the name of the worker who turns in the tickets at the end of the day. In some cases, the work done by four or five workers may be listed under a single name. Often, the work of alien workers who lack valid social security numbers is recorded under the name of a former U.S. worker with a valid number. Unlike the situation in which a worker is using an alias or a false social security number, workers in this situation may be unaware that their work is being improperly recorded. Sometimes certain workers are not listed at all on payroll records furnished by the contractor to the farm operator. In some cases records which once existed were lost or stolen. In some cases, records are simply not kept.

Congress specifically recognized this problem and provided a solution when it created the SAW program. If an employer or farm labor contractor kept proper and adequate records, the applicant's burden of proof "may be met by securing timely production of work records under regulations promulgated by the Attorney General." 8 U.S.C. § 1160(b)(3)(B)(ii).[12] When records are nonexistent or unavailable, the applicant can meet the burden of proof "by producing sufficient evidence to show the extent of that employment as a matter of just and reasonable inference. In such a case, the burden then shifts to the Attorney General to disprove the alien's evidence with a showing which negates the reasonableness of the inference to be drawn from the evidence." 8 U.S.C. § 1160(b)(3)(B)(iii).[13] Congress intended

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[12] Although only three and one-half months remain in the application period, the Attorney General has not promulgated any regulations which provide for the timely production of this proof. On May 31, 1988, the District Court for the Eastern District of California issued a preliminary injunction ordering Defendant Nelson to forthwith promulgate regulations which shall provide for the timely production of employment records in accordance with IRCA. *United Farmworkers of America (AFL-CIO et al., v. INS et al.*, Civil Action No. 87-1064-LKK (E.D. Cal. May 31, 1988). As of July 21, 1988, Defendants had not promulgated any regulations.

[13] Congress intended that for purposes of interpretation of the requirements of section 210, 8 U.S.C. § 1160(b)(3)(B) the standards embodied in Fair Labor Standards case law govern. The House Report noted:

> in a line of cases leading from *Anderson v. Mt. Clemens Pottery Co.*, 66 S.Ct. 1187 (1946), (including cases which specifically address the unique documentation of work history problems in the agriculture, such as *Beliz v. W.H. McLeod Co.*, 765 F.2d 1317 (1985)), courts have dealt

to encourage aliens to utilize the SAW program and to aid growers of perishable commodities often dependent upon a crew of illegal laborers to harvest crops. H.R. Conf. Rep. No. 99-1000, 99th Cong., 2d Sess. 85, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5840, 5850-51.

Wayne Joy and John Adamczyk both testified that the Defendants were directed to take a liberal view in determining whether the just and reasonable inference had been created, yet Defendants have not received any training or instructions as to the shifting burden of proof to be employed in SAW cases. Wayne Joy stated that the burden required to meet the just and reasonable inference is identical to the burden required to meet the nonfrivolous standard.

On May 1, 1987, the INS issued regulations allowing applicants to establish qualifying employment by submitting affidavits of growers, foremen, farm labor

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> with fact patterns involving employee loss of records, destruction or falsification of records by employers, and other difficult circumstances where precise evidence of hours worked is lacking.
>
> *This problem is compounded in agriculture*, where pay records may only show piece rate units completed. While this Act will require evidence of hours worked, the lack of hourly records for agricultural employees (which could result from small employer exemptions from wage and hour laws as well as from employment by farm labor contractors or others whose recordkeeping practices are deficient), has led the Conferees to conclude that fairness dictates they create a presumption in favor of worker evidence, unless dispoved [sic] by specific evidence adduced by the Attorney General.

H.R. Conf. Rep. No. 99-1000, 99th Cong., 2d Sess 85, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5840, 5853 (emphasis added).

contractors, and fellow employees.[14] The regulations require the affiant to provide a certified copy of corroborating records or state his or her willingness to verify personally the information contained therein.[15]

Prior to the application period, representatives of several Qualified Designated Entities ("QDEs") met with the Deputy Commissioner of the INS in charge of the SAW program and developed an affidavit for use by applicants to satisfy the requirements of the regulation. The I-705 "Affidavit Confirming Seasonal Agricultural Employment of an Applicant for Temporary Residence Status Under Section 210 of the Immigration and Nationality Act," is designed to provide information of when, where, and in what crops the applicant labored. The form, which recites that the affiant is "willing to personally confirm this information, if requested" and is to be signed under penalty of perjury, was published in the Federal Register at 52 Fed. Reg. 16195 (May 1, 1987).

During the first several months of the program, affidavits sufficed to corroborate the applicant's claim of employment. Suspicion of widespread fraud in the application procedure led the LOs to demand cor-

[14] 8 C.F.R. § 210.3(c)(3). "The weight and probative value of any affidavit accepted will be determined on the basis of the substance of the affidavit and any documents which may be affixed thereto which may corroborate the information provided." *Id.*

[15] Defendants testified, however, that in the majority of cases they do not contact the affiant/crew leader to verify the information contained in the I-705 and supporting crew leader affidavits. Similarly, Wayne Joy testified that crew leader affidavits are generally not considered as credible evidence if the farm owner has no independent record regarding the SAW applicant.

roborative evidence, such as payroll records, pay stubs, and rent receipts, and to deny many applications accompanied only by the form I-705 affidavit.

According to defendants' testimony, an affidavit would not be sufficient if the weight of the affidavit comes into question because of its connection to fraud, inconsistencies, or other credibility questions. The defendants' standard for judging credibility questions may hinge upon the fact that applicants often cannot identify the grower, the name of the farm, or the area in which it is located.[16] Farm workers may only know the name of their crew leader or labor contractor who collects them from a preappointed spot in the morning and redelivers them in the evening. Therefore "inconsistencies" between the interview and the written application may develop because an applicant improperly identifies a "growing area" or cannot name an employer. The interview is the sole means of judging an applicant's credibility.

The Miami District developed a list of farm labor contractors and immigration consultants suspected by the INS of being involved in fraudulent applications. The list was given to each interviewer for use in evaluating individual applications. Contractors or others whose names appeared on the "list" were often not aware of the fact nor were they provided with an opportunity to rebut the "suspected" fraud.

Although applicants should be made aware of adverse evidence considered during the evaluation of their applications, 8 C.F.R. § 103.2(b)(2), appli-

[16] Applicants have been denied at the local office because of an inconsistency between the dates the applicants claimed to have worked and a chart or map showing harvest dates to which the examiner referred.

cants were not told if an affiant who supported the alien's applications appeared on the list nor were they given an opportunity to supplement their applications to support a suspect affidavit.[17] Applicants were not told if or why their applications were recommended for denial.[18]

Plaintiffs Henry and Jean-Phillipe, denied after their initial interview because their affiant appeared on the list of "suspected" labor contractors, were not given the opportunity to rebut the adverse evidence. In some cases, all applications accompanied by an affidavit bearing the name of a contractor or other individual whose name appeared on the "list" were denied for failure to produce corroborative evidence, despite the fact that some of those who appeared on a list were genuine crewleaders whose names had been used by another. In such a case, though the applicant had actually worked for the suspected crewleader, his

[17] The regulations contemplate the possibility of a second interview required by the RPF "if the alien in the second interview can establish eligibility for approval." 8 C.F.R. § 103.1(n)(2). No evidence suggested that any applicant was given a second interview.

[18] In addition to the lists of suspect individuals utilized at the LO level, Defendant Chambers testified that at the RPF, examiners received reports from the Document Analysis Unit ("DAU") as well as other agencies concerning SAW applicants and affiants suspected of fraud. The DAU regularly prepares reports or bulletins which go to each of the examiners as well as to all LO's in the Region. (Testimony of William Chambers). In general, cases in which fraud was suspected were not denied on the basis of fraud or misrepresentation but on the grounds that the applicant had failed to meet his or her burden of proof. Thus, applicants were not specifically informed that the basis of the denial was evidence concerning a contractor, the nature of that evidence, or of any other evidence which adversely affected their cases.

or her application was denied merely because the crewleader's name was under suspicion. William Chambers testified that form notices of denial were issued to hundreds possibly thousands of applicants. The denial stated that the "affidavits were signed by the same affiant and were not substantiated by any additional credible evidence such as piecework receipts or employers' daily records." [19]

A wire addressed to all district directors, regional legalization officers, and the Legalization Appeals Unit, dated April 11, 1988, instructed the parties that 8 C.F.R. § 103.2(b) requires that applicants be advised of adverse evidence considered by the INS and that they be given an opportunity to present evidence to rebut it prior to a decision. The directive provided that an I-72 notice be sent to any applicant whose application was to be denied because of adverse evidence and that the applicant be given thirty days to overcome its inference. But no measures were

[19] Plaintiffs Angrand, Cadet, Dieudonne, Neus, Pierre, Tamayo and Vega each received an identical form denial which contained the same two paragraphs:

> In support of your application, you have submitted a Form I-705, Affidavit Confirming Seasonal Agricultural Employment, and a written affidavit to establish your eligibility. However, these affidavits were signed by the same affiant, and *were not substantiated by any additional credible evidence such as piecework receipts or employers' daily records.*
>
> In the *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966), it was held that the burden of proof is upon the alien to establish his or her eligibility for a benefit. Pursuant to Title 8, Code of Federal Regulations, Part 210.3(b)(1), the burden of establishing eligibility for the benefit you seek falls upon you. You have failed to meet this burden.

(emphasis added).

taken to correct denials effected without informing the applicant of adverse evidence that occurred prior to issuance of the directive.[20]

JURISDICTION

The defendants challenge the jurisdiction of the court without which the remainder of this decision would be fruitless. Therefore this court, having considered the question as a threshold issue, finds jurisdiction vested for adjudication of this matter.

The defendants note that both administrative and judicial review of INS decisions on SAW applications are provided for by IRCA. Title 8 U.S.C. § 1160, the IRCA provision addressing legalization for SAW applications, expressly states that sole judicial review of a denial of SAW status occurs during the applicant's deportation case. It provides:

> There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.
>
> * * * *

[20] The wire did specify that any denial based upon adverse evidence not supplied to the applicant and prior to issuance of an I-72 notice would be subject to reopening upon a motion by the applicant. The regulations, however, provide no mechanism to reopen and in fact state: "Motions to reopen a proceeding or reconsider a decision under Part 210 or 245a of this chapter *shall not be considered.*" 8 C.F.R. § 103.5 (emphasis added). Although section 103.5 allows the Associate Commissioner Examinations or the Chief of the Administrative Appeals Unit to *sua sponte* reopen any proceeding under Part 210, no effort to reconsider any decision rendered prior to April 11, 1988, has been made.

> There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title.

8 U.S.C. § 1160(e)(3)(A).

The defendants urge that Congress deliberately structured the system in a way to exclude participation by district courts. Under IRCA, aliens cannot contest the denial of their SAW applications unless and until the INS institutes deportation proceedings against them.[21] District courts lack jurisdiction to adjudicate deportation proceedings which are initially tried by an immigration judge. 8 U.S.C. § 1252(b); 8 C.F.R. §§ 1.1(1) and 242.8. Appeal of an adverse decision by the immigration judge goes to the Board of Immigration Appeals. 8 U.S.C. § 1105a(c); 8 C.F.R. § 3.1(b). Only after exhausting these administrative remedies may an alien seek review and his appeal is then directed to the courts of appeals. 8 U.S.C. § 1105(a)(2). It cannot be disputed that "petition for review in the Court of Appeals 'shall be sole and exclusive procedure for the judicial review of all final orders of deportation . . . .'" *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 937 (1983) (quoting Immigration and Nationality Act § 106(a), 8 U.S.C. § 1105a(a)). Therefore, had the plaintiffs chosen to challenge denial of the individual applications, this court would be without power to address the complaint. The plaintiffs' complaint, however, does not challenge any individual determina-

[21] Section 210(e), 8 U.S.C. § 1160(e)(2) provides for a single level of administrative appellate review of applications and restricts judicial review to the context of review of an order of exclusion or deportation.

tion of any application for SAW status but rather attacks the manner in which the entire program is being implemented, allegations beyond the scope of administrative review.

In *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982), the Fifth Circuit considered a class action suit brought by Haitians seeking political asylum in the United States. The complaint challenged the expedited administrative procedure employed by the INS in processing the asylum applications of members of the plaintiff class. The government argued the same grounds that it is arguing before this court, that is: (1) exclusive jurisdiction is conferred upon the courts of appeals under 8 U.S.C. § 1105a(a), and (2) though the court has jurisdiction, it should decline to exercise it because the plaintiffs failed to exhaust their administrative remedies. The court in *Smith* recognized congressional intention to give the courts of appeals exclusive jurisdiction over all final orders of deportation, but the court also highlighted the narrow exception that allows juristion to the district court "insofar as the [complaint] set[s] forth matters alleged to be part of a pattern and practice by immigration officials to violate the constitutional rights of a class of aliens" under its federal questions jurisdiction. 676 F.2d at 1033. The court stated that to the extent that the "irregularities may provide a basis for reversal of an individual deportation," the court of appeals still has exclusive jurisdiction to review the alleged procedural irregularities. *Id.* The court drew a distinction "between the authority of a court of appeals to pass upon the merits of an individual deportation order and any action in the deportation proceeding to the extent that it may affect the merits determination, on the one

hand, and, on the other, the authority of a district court to wield its equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged." *Id.*

In *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), the Eleventh Circuit considered a class action on behalf of Haitian aliens detained in facilities pending final determination of their asylum cases. The plaintiffs alleged violations of the Administrative Procedure Act and discriminatory detention. The court stated that "executive officials 'function as agents of Congress in enforcing the law . . . . If such officers depart from the zone of authority charted in the statute they act illegally and their actions can be corrected in the courts.'" 727 F.2d at 966 (citations omitted).

In the case before this court, the plaintiffs allege that the defendants have exceeded their authority by illegal implementation of stated congressional intent. To deny jurisdiction would be to allow illegal agency action to go unchallenged. *Lloyd Sabaudo Societa Anomina Per Azioni v. Elting*, 287 U.S. 329 (1932); *Mahler v. Eby*, 264 U.S. 32 (1924); *Gegiow v. Uhl*, 239 U.S. 3 (1915). This court does not, by this decision, intend to widen the narrow holding in *Smith* but rather finds that the present case fits within that narrow exception.[22]

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[22] Apart from the federal question jurisdiction raised by the allegation of any constitutional violations is the question of whether an agency deviated from its own regulations and procedures, an issue justifying judicial relief in a case otherwise properly before the court. *See Haitian Refugee Center v. Smith*, 676 F.2d at 1041 n.48 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954)).

STANDING

The defendants assert that the organizational plaintiffs lack standing because they have not established a cognizable injury nor have they established the causation elements required to find a case or controversy. To establish standing, "at an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)), "and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge*, 454 U.S. at 472 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976) (footnote omitted)). The exercise of judicial authority is thus limited to litigants who are able to demonstrate "injury in fact" resulting from the complained of behavior. *Valley Forge*, 454 U.S. at 473.

The Supreme Court has also recognized that, beyond constitutional requirements, there exist certain prudential principles that require the court to refrain from adjudicating " 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge*, 454 U.S. at 475 (quoting *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975) (footnote omitted)). Finally, the plaintiffs' complaint must fall within "the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge*,

454 U.S. at 475 (quoting *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (footnote omitted).

The organizational plaintiffs before this court have satisfied both constitutional and prudential requirements for standing and thus their claims are cognizable. The constitutional requirements encompass three components: (1) injury in fact, (2) causation, and (3) redressability. Numerous courts have found standing based upon allegations similar in scope to those presented by the plaintiffs HRC and MRS.

HRC has alleged that the "[d]efendants' refusal to recognize that such persons [HRC's members] are eligible under IRCA both directly and indirectly injures HRC. It directly injures the organization because it makes HRC's work of assisting the Haitian refugee community more difficult and results in the diversion of HRC's limited resources away from members and clients having other urgent needs." Complaint at ¶ 17. HRC also alleges an indirect injury through the adverse effect upon its members. *Id.* The plaintiff MRS is a QDE under IRCA authorized to provide counseling to aliens about the legalization process and to assist them in obtaining documentation. It also receives applications and fees from aliens and is reimbursed by the INS for counseling and filing services. MRS alleges that the defendants' behavior has discouraged otherwise eligible SAW applicants from seeking counseling and/or filing their claims and MRS is prevented from fulfilling its basic mission of assisting aliens to qualify under IRCA. *Id.* at ¶ 18.

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Supreme Court addressed the standing of an organization. Housing Opportunities Made

Equal ("HOME"), whose purpose was "'to make equal opportunity in housing a reality in the Richmond Metropolitan Area.'" *Id.* at 368 (quoting App. at 13, ¶ 8). The organizational plaintiff's activities included operation of a housing counseling service and the investigation and referral of complaints of housing discrimination. 455 U.S. at 368. The Court found that:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home-seekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests . . . ."

Id. at 379. The plaintiff HOME's complaint alleged simply that it "has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices." *Id.* at 379.

In *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986), the court, recognizing the standard set by the Supreme Court in *Havens*, found that the appellant, whose function was, through informational counseling, referral, and other services, to improve the lives of elderly citizens, had sufficient standing to press its claim. As in the case before this court, the appellant in *Action Alliance* alleged "in-

hibition of their daily operations, an injury both concrete and specific to the work in which they are engaged." 789 F.2d 938 (footnote omitted).

HRS and MRS, whose very existence is devoted to assisting Haitian refugees through legal counseling and referral, have concrete programmatic concerns that form an adequate basis for alleging an injury in fact and thus fulfill the primary constitutional requirement for standing.[23] But, though a plaintiff demonstrates a very real injury, it may lack standing because of the absence of causation or redressability. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 40-46. The causal connection in the present case cannot be deemed "speculative." *See id.* at 45. The defendants in the case before this court have actual control over the implementation of the SAW program and their alleged mishandling is the very basis for the plaintiffs' complaint. Finally, because the defendants control implementation of the regulations, requiring them to recognize and abide by these regulations would provide the plaintiffs with the remedy they seek and resolve the alleged injury.[24] Therefore the plaintiffs meet the Article III requirements for standing to pursue this action.

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[23] "That the alleged injury results from the organization's noneconomic interest in encouraging open housing does not affect the nature of the injury suffered, *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977), and accordingly does not deprive the organization of standing." *Havens*, 455 U.S. at 379 n.20.

[24] The court in *Action Alliance* noted that "dismissal on the pleadings is inappropriate, even if 'the extreme generality of [a] complaint' leaves 'injury in fact' in doubt, when standing requirements may be satisfied upon affording plaintiffs 'an opportunity to make more definite the allegations of the complaint.'" 789 F.2d at 938 (quoting *Havens*, 455 U.S. at 377-78).

The dispute before this court also fulfills the prudential standing requirements outlined in *Valley Forge*. 454 U.S. at 475. The interests at stake are not " 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches," *Id.* (quoting *Warth v. Seldin*, 422 U.S. at 499-500), but rather are particularized concerns that affect an identificable group of people. Finally, HRC claims that defendants' behavior makes it increasingly difficult to render the legal assistance that forms the core of its functions. HRC's interest in aiding the applicants' legalization process falls squarely within the "zone of interests" that is protected by the statute. *See, e.g., Action Alliance*, 789 F.2d at 939 (interests as promotion of knowledge, enjoyment, and protection of rights created by a statute are in the zone of interests); *Animal Welfare Institute v. Kreps*, 561 F.2d 1002, 1010 (D.C. Cir. 1977) (environmental group's participation in passage of the statute); *Consumers Union v. Federal Trade Commission*, 691 F.2d 575, 576-77 (D.C. Cir. 1982) (en banc) (consumer groups may challenge FTC rules that withhold used car information from consumers)

CLASS CERTIFICATION

Fed. R. Civ. P. 23(a) lists four prerequisites to class certification: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Rule

23(b)(2) allows a class action when the requirments of 23(a) have been met and "the party opposing the class action has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding relief with respect to the class a whole."

The defendants have not challenged the adequacy of the representative parties' protection of the class interests and so this court will address only those challenges to class certification that contend: (1) the numerosity allegations are too vague to be credited; (2) the plaintiffs have not demonstrated that they meet the commonality and typicality requirements; and (3) the plaintiffs never clearly described the class they seek to have certified. This court concludes that the defendants' arguments lack merit for the following reasons.

The defendants correctly state that the mere allegation that a class is too numerous to make joinder practicable is insufficient to satisfy this basic requirement. *See, e.g., Fleming v. Travenol*, 707 F.2d 829, 833 (5th Cir. 1983). A court must look to the specific facts of each case to determine the number of potential class members and whether joinder is possible. *See Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980). Defendants err, however, by applying that rationale in this context. In their complaint, the plaintiffs define their action as one that "challenges the practices, policies and procedures of the INS for determining Lawful Temporary Resident status under the SAW program." The challenge is based on two grounds: (1) that the plaintiffs have been cast with an improper burden of proof in establishing their right to a change in residence status; and (2) that the INS has failed to promulgate regulations to

ensure that the applicants are able to secure needed records to establish their claims.

The plaintiffs Angrand, Cadet, Dieudonne, Neus, Pierre, Tamayo, and Vega each received an identical form denial, *see* n.14 *supra*, which merely stated that they had failed to submit sufficient credible evidence to substantiate their claims because their affidavits were not accompanied by "piecework receipts or employers' daily records." These form denials, which the plaintiffs allege were defective by imposing an improper burden of proof and by failing to state with particularity the reasons for denial were, according to defendants' witness William Chambers, issued to hundreds possibly thousands of applicants. Therefore the persons who have been affected by what the plaintiffs allege is illegal implementation of congressional policy number in the hundreds, possibly thousands, and therefore the numerosity allegations have been sufficiently established. The very number of the persons affected as well as the nature of their work and their economic means makes joinder impracticable.[25] *See, e.g., Jean v. Nelson*, 727 F.2d 957, 961 n.2 (11th Cir. 1984) (class certified by the district court was comprised of "[a]ll Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry

[25] The question of what constitutes impracticability depends on the particular circumstances in each case. *See* 7 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil § 1782. In *Armstead v. Pingree*, 629 F. Supp. 273 (D.C. Fla. 1986), the court found joinder impracticable particularly in light of the class members' economic resources, handicap, and confinement. In the instant case, the putative class members are migrant workers whose economic means militate against individual suits. In addition, the nature of the work requires that its laborers follow the agricultural seasons.

into the United States and also are presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are either: (1) Unrepresented by counsel; or (2) Represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Task Force of the Dade County Bar Association") (quoting *Louis v. Nelson* [*Louis III*], 544 F. Supp. 973, 984 (S.D. Fla. 1982); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1026 n.1 (11th Cir. 1982) (class certified by the district court included "all Haitian nationals who have applied for political asylum on or before May 9, 1979 under 8 C.F.R. § 108, and whose applications were or may be denied by the INS District Director or his designee in INS District Office No. 6, Miami, Florida").

The defendants challenge the plaintiffs' contention that there exist common questions of law or fact and that the representative parties exhibit claims that are typical of the class as a whole. Fed. R. Civ. P. 23(a)(2). It must be noted that this provision does not require that all of the questions of law and/or fact raised by the case be common to all the plaintiffs. *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526, 532 (5th Cir. 1978); 7 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil § 1763 (1986) (hereinafter Wright & Miller). Class actions seeking injunctive or declaratory relief—as in the instant case—by their very nature present common questions of law or fact. 7 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure: Civil § 1763. Commonality also exists when plaintiffs allege that a defendant has acted or is acting uniformly regarding a class. *Haitian Refugee Center v. Smith*, 676 F.2d at 1033. The class of plaintiffs in

this case allege that they were denied temporary residence status because the defendants imposed an illegal burden of proof that the applicants were unable to meet. Such an allegation is sufficient to meet the commonality and typicality requirements of Rule 23(a)(2) and (3). *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986) (claims actually litigated must simply be those fairly represented by the named plaintiffs).

Finally, the court rejects the defendants' argument that the plaintiffs did not adequately describe the class. The defendants' very requirements for eligibility under the SAW program identify the class members with sufficient particularity for this court to determine whether a SAW applicant is a member. Therefore the class certified shall consist of all persons who have applied for, or will apply for, adjustment to lawful residence under the Special Agricultural Worker ("SAW") program within the eighteen month period and who have been or will be denied such status by the INS within this circuit because of the defendants' unlawful practices and policies.

PRELIMINARY INJUNCTION

The plaintiffs seek preliminary injunctive relief under Fed. R. Civ. P. 65(a), the purpose of which is to prevent irreparable injury and preserve the court's ability to render a meaningful decision on the merits. *United States v. Alabama*, 791 F.2d 1450, 1459 (11th Cir. 1986). Because the application period under the SAW program terminates on November 30, 1988, preliminary injunctive relief is necessary to ensure that a remedy will be available. *Id.* (citing *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir. 1984)). With full understanding that a preliminary injunction is an extraordinary and drastic remedy, the grant of which is exceptional, this court, nevertheless, finds that the cirmumstances before it require such relief.[26]

To be entitled to injunctive relief, the plaintiffs must establish four factors: (1) substantial likelihood that they will prevail on the merits; (2) they will suffer irreparable injury if the injunction is not granted; (3) the threatened harm to the plaintiffs outweighs the potential harm to the defendants; and (4) the public interest will not be harmed if the injunction should issue. *United States v. Alabama*, 791 F.2d at 1459 n.10; *Johnson v. Department of Agriculture*, 734 F.2d 774, 781 (11th Cir. 1984); *Cate v. Oldham*, 707 F.2d 1176, 1185 (11th Cir. 1983); *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983).

Likelihood of Success

The plaintiffs allege that the defendants have violated the applicants' due process rights under the Fifth Amendment by the manner in which they are implementing the SAW program. The plaintiffs cite what they allege to be an improper burden of proof in establishing eligibility under the program, defendants' failure to publish new rules governing SAW applications, practice or denying non-frivolous claims at the LOs, and failure to advise applicants of specific reasons for denial of their applications.

The Supreme Court has recognized that a constitutionally protected liberty or property interest may be

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[26] The grant or denial is a decision within the sound discretion of the district court. *Lambert*, 695 F.2d at 539 (citing *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 332 (5th Cir. 1981).

created by positive rules of law enacted by the federal government and creating a substantial entitlement to a particular government benefit. *Haitian Refugee Center v. Smith*, 676 F.2d at 1038. In *Smith*, the Fifth Circuit found a constitutionally protected right to petition the federal government for political asylum in federal regulations establishing asylum procedures. In the case before this court, the applicants have a constitutionally protected right to seek SAW status under IRCA and the resultant regulations. *Smith* recognized a problem that also faces this court—that fundamental fairness, the very essence of due process, is violated when the government creates a right to petition and then makes it utterly impossible to exercise that right. 676 F.2d at 1039.

Thus the individual plaintiffs have been afforded the right to seek temporary residency in this country through the congressionally created SAW program. Congress intended that the program be liberally applied to encourage undocumented farm workers to come forward and seek legalization. The program was created in a way to circumvent the well recognized problem of documentation that exists for migrant worker [*sic*]. The evidence before this court strongly suggests that, despite congressional directives, applicants are being required to produce exactly what they cannot, i.e., payroll records.

The Supreme Court has repeatedly emphasized that, not only must an aggrieved party be given the opportunity to "some form of hearing" prior to being deprived of a protected interest, the hearings must be conducted "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The applicants in this case were expected to defend their applications against inferences of "suspected fraud," "lack of credibility," or "inconsistencies" to interviewers who did not speak their language and were not schooled in their culture. Applicants were not advised when their applications were recommended for denial, and were deprived of the opportunity to rebut any adverse inferences drawn from their interviews. Hundreds perhaps thousands of applicants received denial notices stating only that submitted affidavits were "not substantiated by any additional credible evidence such as piecework receipts or employers' daily records." They were misinformed about the time within which they were required to appeal an adverse decision, and not informed at all of where to submit an appeal. It is difficult to find that the above circumstances constituted a "meaningful" opportunity to be heard.

Under section 210(a)(1) of the INA, as amended by IRCA, 8 U.S.C. § 1160(a)(1), the Attorney General *"shall"* adjust the status of an alien who creates a just and reasonable inference of eligible employment and meets the other requirements of the statute. The Attorney General must also grant an application when a just and reasonable inference is shown unless the reasonableness of the inference is negated a "showing." 8 U.S.C. § 1160(b)(3)(B)(iii). Congress intended that the standards outlined in the case law interpreting the Fair Labor Standards Act be applied to the SAW program. *See* n.13 *supra*. *See, e.g., Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (employee must produce sufficient evidence from which the amount of time worked may be determined as a just and reasonable inference and the burden then shifts to the employer to negate

the reasonableness of the inference).[27] In *Belieze v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1330-31 (5th Cir. 1985), the court recognized that a just and reasonable inference may be established through testimony of other employees. *See also Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825 (5th Cir. 1973). In *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3rd Cir. 1984), the court, in a footnote, chided the defendants who erroneously contended that no case has permitted the testimony of plaintiffs alone to satisfy the burden *Anderson* places upon employees by pointing to *Marshall v. Van Matre*, 634 F.2d 1115, 1119 (8th Cir. 1980) and *Mitchell v. Williams*, 420 F.2d 67, 70-71 (8th Cir. 1969). *See Williams*, 747 F.2d at 128 n.13. The court, in rejecting the defendant's argument that testimony alone was insufficient to create a just and reasonable inference, remarked that when "employees are migrant farm workers, it is difficult to imagine what other evidence the defendant would require [the farm workers] to produce." 747 F.2d at 128 n.13.

The defendants in the present case are rejecting the "just and reasonable" inference established by the applicants' proffered affidavits on the basis of arbitrary credibility determinations that rest partly on suspicion of widespread fraud. The statute, however, requires that the applicant's "just and reasonable inference" be countered by "a showing that negates the reasonableness of the inference," and not the mere suspicion of wrongdoing.

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[27] In *Smith*, the court conceded that the right to petition for asylum is "a fragile one," but nevertheless a valuable one to its possessor. 676 F.2d at 1039. Likewise, in this case, the right is invaluable to the applicants seeking residency in this country.

Irreparable Injury

The key word in the determination of the injury that will result from a denial of a motion for preliminary injunction is "irreparable." *United States v. Jefferson*, 720 F.2d 1511 (11th Cir. 1983). An injury is "irreparable" for purposes of a preliminary injunction only if it cannot be undone through monetary remedies. *Cate v. Oldham*, 707 F.2d 1176; *Deerfield Medical Center*, 661 F.2d 328. *See also Jets Service Inc. v. Hoffman*, 420 F. Supp. 1300 (D.C. Fla. 1976) (a recognized, legitimate interest that will vanish if not preserved constitutes irreparable injury).

The injury to the individual plaintiffs and the class involves a denial of temporary residency that will be adjusted to permanent residency within two years. This court cannot say that any monetary remedy would compensate for the loss of the benefits afforded by United States residency. The opportunity offered to the applicants is of limited duration, limited by the eighteen month application period ending on November 30, 1988.

SAW applicants whose applications were denied at the LO and those applicants who failed to appeal timely denials because of improper notices lack work authorization and thus a means of livelihood. The plaintiffs, HRC and MRS are unable to provide their members with the services that form the core of the organizations' functions.

Balance of Interests

The possible harm to the plaintiffs must be balanced against the possible harm to the defendants. In a case which involves a government agency, this factor is often intertwined with the public interest considera-

tion. *See Baker v. School Board of Marion County*, 487 F. Supp. 380, 383 (M.D. Fla. 1980). The defendants allege that the administrative burden that will result from the grant of injunctive relief outweighs the interests at stake. This court does not agree. Although it is true that the relief the plaintiffs seek involves necessary administrative expense and time, the loss to the plaintiffs is of such a magnitude to justify the additional burden. This court may use a sliding scale analysis, in which a strong showing of one factor may lessen the requirement for another. In addition, the overriding prerequisite is irreparable injury without an adequate remedy at law. *Baker v. School Board*, 487 F. Supp. at 383 citing *Sampson v. Murray*, 415 U.S. at 61, 88-89 (1974)). Plaintiffs who have been improperly denied a change of status have suffered a very great loss as will those possibly denied in the future. When the program concludes on November 30, 1988, the chance to qualify under the program is gone. There exists no remedy at law that this court is aware of to compensate for this loss and therefore this court finds that the injunctive relief requested by the plaintiffs is proper.

It is thus the considered decision of this court that the class of plaintiffs described in this decision be certified and the injunctive relief be granted. An appropriate preliminary injunction order shall be entered.

DONE AND ORDERED at Miami, Florida, this 22nd day of August, 1988.

/s/ C. Clyde Atkins
United States District
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-1066-CIV-ATKINS

HAITIAN REFUGEE CENTER, INC., ET AL., PLAINTIFF

v.

ALAN C. NELSON, Commissioner of Immigration and Naturalization Service, ET AL., DEFENDANTS

[Filed Aug. 22, 1988]

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

THIS CAUSE is before the court on the plaintiffs' motion for a preliminary injunction. After reviewing all of the submitted memoranda, after an extensive hearing, and after reviewing post hearing memoranda, it appearing that the plaintiffs and members of their class will suffer irreparable harm absent the preliminary relief sought because they will be denied the ability to earn a living and to support themselves and will be subject to deportation by the defendants, it is

ORDERED AND ADJUDGED as follows:

The defendant Alan C. Nelson, as Commissioner of Immigration and Naturalization Service and the United States Immigration and Naturalization Serv-

ice ("INS") and all persons acting by, through, or subject to their control or supervision, shall comply with the following:

(1) In those cases in which the INS issued notices of denial which did not comply with the requirements of 8 C.F.R. § 103.3(a) because they did not advise the applicant of the correct procedure for appeal or did not provide specific reasons for denial, the INS shall vacate the denials and issue new notices of denial which comply with 8 C.F.R. § 103.3(a);

(2) In those cases in which the INS considered evidence adverse to the applicant of which the applicant was unaware, contrary to 8 C.F.R. § 103.2(b)(2), the INS shall vacate the denials, afford the applicant an opportunity to examine the adverse evidence, to rebut it, and to offer additional evidence before rendering a decision;

(3) In those cases which the INS denied based in whole or in part on the fact that the applicant failed to submit payroll records or piecework receipts, the INS shall vacate the denials and reconsider the cases in light of the proper standard of proof which will require the government to present evidence to negate the just and reasonable inference created by the affidavits and other documents submitted by the applicant;

(4) The INS shall vacate those denials issued by the Legalization Offices during the period June 1, 1987, to March 29, 1988, unless the government can show that the applications were clearly frivolous based upon the documentation submitted by the applicant or that the applicant admitted fraud or misrepresentation in the application process;

(5) The INS shall issue temporary work authorization to all class members pending the final outcome

of the proceedings in this case and a final decision on the merits of their individual cases;

(6) The Legalization Offices shall maintain competent translators, at a minimum, in Spanish and Haitian Creole, and translators in other languages shall be made available if necessary;

(7) The INS shall afford the applicants the opportunity to present witnesses at the interview including but not limited to growers, farm labor contractors, co-workers, and any other individuals who may offer testimony in support of the applicant;

(8) The interviewers shall be directed to particularize the evidence offered, testimony taken, credibility determinations, and any other relevant information on the form I-696.

This order shall remain in effect pending further order of this court. The plaintiffs are directed to post security in the amount of $500 by 4 p.m. on August 25, 1988, in accordance with Fed. R. Civ. P. 65(c).

DONE AND ORDERED at Miami, Florida this 22nd day of August, 1988

/s/ C. Clyde Atkins
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-5934

HAITIAN REFUGEE CENTER, INC., a not-for-profit corporation, ROMAN CATHOLIC DIOCESE OF PALM BEACH, MARIE GIZELE ANGRAND, GERMAINE CADET, ROSITA DELVA, DIEUMERCIE DESIR, JOSEPH SAINTIL DIEUDONNE, GERARD HENRY, MARIE FRANCE JEAN-PHILIPPE, NOVAMISE JULIEN, FRANCKLIN JOSEPH, SYLVIA LINDOR, PLAINTIFFS-APPELLEES

versus

ALAN C. NELSON, Commissioner of Immigration and Naturalization Service, PERRY RIVKIND, District Director, Immigration and Naturalization Service, District Office Number 6, KENNETH PASQUARELL, District Director, Immigration and Naturalization Service, District Office Number 26, WILLIAM CHAMBERS, Director, Immigration and Naturalization Service Regional Processing Facility for the Southern Region, IMMIGRATION AND NATURALIZATION SERVICE, Department of Justice, RICHARD NORTON, Associate Commissioner for Examination, Immigration and Naturalization Service, DEFENDANTS-APPELLANTS

[Filed Oct. 10, 1989]

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARINIG AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion May 23, 1989, 11 Cir., 198—,
—— F.2d ——)

Before RONEY, Chief Judge, VANCE, Circuit Judge and KAUFMAN*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

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* Hon. Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

8 U.S.C. 1105a provides in pertinent part:

§ 1105a. Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that—

(1) Time for filing petition

a petition for review may be filed not later than 6 months after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony, not later than 60 days after the issuance of such order;

(2) Venue

the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this chapter, of the petitioner, but not in more than one circuit;

* * * * *

(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. * * *

8 U.S.C. 1160 provides in pertinent part:

§ 1160. Special agricultural workers

(a) Lawful residence

(1) In general

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the Attorney General determines that the alien meets the following requirements:

(A) Application period

The alien must apply for such adjustment during the 18-month period beginning on the first day of the seventh month that begins after November 6, 1986.

(B) Performance of seasonal agricultural services and residence in the United States

The alien must establish that he has—

(i) resided in the United States, and

(ii) performed seasonal agricultural services in the United States for at least 90 man-days,

during the 12-month period ending on May 1, 1986. For purposes of the previous sentence, performance of seasonal agricultural services in the United States for more than one employer on any one day shall be counted as performance of services for only 1 man-day.

(C) Admissible as immigrant

The alien must establish that he is admissible to the United States as an immigrant, except as otherwise provided under subsection (c)(2) of this section.

* * * * *

(e) Administrative and judicial review

(1) Administrative and judicial review

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

(2) Administrative review

(A) Single level of administrative appellate review

The Attorney General shall establish an appellate authority to provide a single level of administrative appellate review of such a determination.

(B) Standard for review

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of determination.

(3) Judicial review

(A) Limitation to review of exclusion or deportation

There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title.

(B) Standard for judicial review

Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

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